



**KENTUCKY JUSTICE CABINET**

**DEPARTMENT OF  
CRIMINAL JUSTICE TRAINING**

**Legal Section**

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# ***COMMAND DECISIONS 2003***

## ***LEGAL UPDATE***



**2002 – 2003**



*Rev. 9/03*



# ***This summary prepared by the Legal Section staff of the Kentucky Department of Criminal Justice Training.***

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***NOTES: While many of these cases involved multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in this update. Readers are encouraged to discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.***

***Non-published opinions are included; they are specifically noted. State and federal rules of procedure strictly limit the use of non-published cases in court proceedings. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates. For that reason, there may be cases that predate the previous Legal Update included in this, and future, Legal Updates.***

***All quotes not otherwise cited are from the case under discussion.***

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## 2003 KENTUCKY STATUTORY CHANGES

**NOTE:** *This document is abridged to include only those statutes applicable to law enforcement agencies. You may view all Kentucky statutes at <http://www.lrc.ky.gov/Statrev/frontpg.htm>*

**KRS 15.440**      Requirements for participation in fund distribution      *[Amended 2003 HB 427 Sect. 2]*

(1)

\* \* \* \* \*

(e)      Requires all police officers, whether originally employed before or after July 1, 1972, and all sheriffs appointed or elected before, on, or after July 15, 1998, and all deputy sheriffs and state or public police officers employed before, on, or after July 15, 1998, to successfully complete each calendar year an in-service training course, appropriate to the officer's rank and responsibility and the size and location of his department, of at least forty (40) hours' duration at a school certified or recognized by the Kentucky Law Enforcement Council. **This requirement shall be waived for the period of time that a peace officer is serving on active duty in the United States Armed Forces. This waiver shall be retroactive for peace officers from the date of September 11, 2001;**

**NOTE: THIS CHANGE ALSO APPLIES TO FULL-TIME FIREFIGHTERS.**

**KRS 15.530**      Definitions      *[Amended 2003 HB 406 Sect 1]*

For the purposes of KRS 15.540 to 15.590:~~[-,]~~

- (1) "CJIS" means the Criminal Justice Information System;**
- (2) "CJIS-full access course" means a forty (40) hour training program approved by the Kentucky Law Enforcement Council;**
- (3) "CJIS telecommunicator" means any full-time public employee, sworn or civilian, whose primary responsibility is to dispatch law enforcement units by means of radio communications for an agency that utilizes the Criminal Justice Information System, and is part of or administered by the state or any political subdivision;**
- (4) "Commissioner" means the commissioner of the Department of Criminal Justice Training;**
- (5) "Law enforcement telecommunicator" means any full-time **public** employee, sworn or civilian, whose primary responsibility is to dispatch law enforcement units by means of radio communications for an agency **that does not utilize the Criminal Justice Information System and** which is part of or administered by the state or any political subdivision;**
- (6) "Law enforcement telecommunicator basic training program" means a forty (40) hour basic training program approved by the Kentucky Law Enforcement Council;**
- (7) "Non-CJIS telecommunicator academy" means a one hundred twenty (120) hour academy approved by the Kentucky Law Enforcement Council; and**
- (8) "Telecommunications academy" means a one hundred sixty (160) hour academy approved by the Kentucky Law Enforcement Council.**

**KRS 15.560**      **Certificate of completion of training course required for appointment or retention as law enforcement telecommunicator –Grandfather clause – Annual in-service training course**      *[Amended 2003 HB 406 Sect. 2]*

- (1) No person shall receive an official appointment on a permanent basis as a law enforcement telecommunicator ~~[to any law enforcement agency in this state,]~~ unless the[such] person has previously been awarded a certificate by the commissioner[secretary of justice] attesting to such person's satisfactory completion of non-CJIS telecommunications academy[an approved law enforcement telecommunicator basic training program]. Every person who is employed after the effective date of this Act[, after July 15, 1986,] as a law enforcement telecommunicator by any law enforcement agency in this state, regardless of prior experience as a law enforcement telecommunicator, shall forfeit his or her position as such unless, within twelve (12) months from the date of his or her employment, he or she satisfactorily completes the non-CJIS telecommunications academy[a basic training program] and is awarded a certificate attesting thereto. The commissioner[secretary of justice] shall waive the training requirements listed in this section for all law enforcement telecommunicators [radio dispatchers] who are serving on June 24, 2003 and possess a certificate of completion of an approved law enforcement telecommunicator[have served continuously for one (1) year immediately prior to July 15, 1986, and shall award each such law enforcement telecommunicator a certificate. Notwithstanding the above, any person employed on or after July 15, 1986, regardless of prior experience as a law enforcement telecommunicator shall successfully complete the] basic training program.
- (2) All law enforcement telecommunicators, whether originally employed before or after June 24, 2003[July 15, 1986], shall successfully complete each calendar year an in-service training course, appropriate to their job assignment and responsibility, of at least eight (8) hours' duration at a school certified or recognized by the Kentucky Law Enforcement Council.
- (3) In the event of extenuating circumstances beyond the control of a law enforcement telecommunicator that prevent completion of training within the time specified, the commissioner or the commissioner's designee may grant the law enforcement telecommunicator an extension of time, not to exceed one hundred eighty (180) days, in which to complete the training.

**KRS 15.565**      **Certificate of completion of telecommunications academy required for appointment as CJIS telecommunicator – Completion of CJIS-full access course required for law enforcement telecommunicator employed as CJIS telecommunicator – Grandfather clause – In-service training courses**      *[NEW 2003 HB 406 Sect. 3]*

- (1) No person shall receive an official appointment on a permanent basis as a CJIS telecommunicator unless that person has previously been awarded a certificate by the commissioner attesting to that person's satisfactory completion of the telecommunications academy. Every person who is employed, after the effective date of this Act, as a CJIS telecommunicator shall forfeit his or her position as such unless, within six (6) months from the date of employment, that person satisfactorily completes the telecommunications academy and is awarded a certificate attesting thereto. The commissioner shall waive the training requirements listed in this section and award a CJIS telecommunicator certificate for all CJIS telecommunicators who are serving on the effective date of this Act and have successfully completed the CJIS-full access course.
- (2) A law enforcement telecommunicator who gains employment as a CJIS telecommunicator shall successfully complete the CJIS-full access course within six (6) months from the date of his or her employment. A law enforcement telecommunicator whose employing agency initiates the use of CJIS shall

successfully complete the CJIS-full access course within six (6) months from the date that the agency initiates the use of CJIS.

- (3) All CJIS telecommunicators, whether originally employed before or after the effective date of this Act, shall successfully complete each calendar year an in-service training course, appropriate to their job assignment and responsibility, of at least eight (8) hours' duration at a school certified or recognized by the Kentucky Law Enforcement Council.
- (4) All CJIS telecommunicators, whether originally employed before or after the effective date of this Act, shall successfully complete, every two (2) years, eight (8) hours of CJIS in-service training at a school certified or recognized by the Kentucky Law Enforcement Council.
- (5) Extensions of time in which to complete the training specified in this section may be granted by the commissioner of the Department of State Police or the commissioner's designee.

**KRS 15.565      Certificate of completion of telecommunications academy required for appointment as CJIS telecommunicator – Completion of CJIS-full access course required for law enforcement telecommunicator employed as CJIS telecommunicator – Grandfather clause – In-service training courses**  
**[NEW 2003 HB 406 Sect. 3]**

- (1) No person shall receive an official appointment on a permanent basis as a CJIS telecommunicator unless that person has previously been awarded a certificate by the commissioner attesting to that person's satisfactory completion of the telecommunications academy. Every person who is employed, after the effective date of this Act, as a CJIS telecommunicator shall forfeit his or her position as such unless, within six (6) months from the date of employment, that person satisfactorily completes the telecommunications academy and is awarded a certificate attesting thereto. The commissioner shall waive the training requirements listed in this section and award a CJIS telecommunicator certificate for all CJIS telecommunicators who are serving on the effective date of this Act and have successfully completed the CJIS-full access course.
- (2) A law enforcement telecommunicator who gains employment as a CJIS telecommunicator shall successfully complete the CJIS-full access course within six (6) months from the date of his or her employment. A law enforcement telecommunicator whose employing agency initiates the use of CJIS shall successfully complete the CJIS-full access course within six (6) months from the date that the agency initiates the use of CJIS.
- (3) All CJIS telecommunicators, whether originally employed before or after the effective date of this Act, shall successfully complete each calendar year an in-service training course, appropriate to their job assignment and responsibility, of at least eight (8) hours' duration at a school certified or recognized by the Kentucky Law Enforcement Council.
- (4) All CJIS telecommunicators, whether originally employed before or after the effective date of this Act, shall successfully complete, every two (2) years, eight (8) hours of CJIS in-service training at a school certified or recognized by the Kentucky Law Enforcement Council.
- (5) Extensions of time in which to complete the training specified in this section may be granted by the commissioner of the Department of State Police or the commissioner's designee.

**KRS 186.440 Persons ineligible for operator's license – Reinstatement fee and exemption [Amended 2003 HB 63 Sect. 2]**

An operator's license shall not be granted to:

\* \* \* \* \*

- (4) Any person whose operator's license has been suspended, during the period of suspension, subject to the limitations of KRS 186.442; (SEE BELOW)

**KRS 186.442 Suspension or revocation of license or driving privileges in another jurisdiction – Persons eligible for restricted license – Issuance of license valid only in Kentucky – Removal of restrictions – Inapplicability to commercial driver's license [NEW 2003 HB 63 Sect. 1]**

- (1) The circuit clerk shall, before issuing or renewing a Kentucky operator's license, verify through the National Drivers Register that the person applying for an initial or renewal Kentucky operator's license does not currently have his or her operator's license or driving privilege suspended or revoked in another licensing jurisdiction.
- (2) If the person's operator's license or driving privilege is currently suspended or revoked in another licensing jurisdiction for a traffic offense where the conviction for the offense is less than five (5) years old, the circuit clerk shall not issue the person an initial or renewal Kentucky operator's license until the person resolves the matter in the other licensing jurisdiction and complies with the provisions of this chapter.
- (3) A person whose operator's license has been suspended or revoked in another licensing jurisdiction, or the holder of a Kentucky operator's license whose driving privileges have been suspended in another licensing jurisdiction, may be issued a Kentucky license, or may renew a Kentucky license if:
- (a) The conviction causing the suspension or revocation is more than five (5) years old;
- (b) The conviction is for a traffic offense other than a felony traffic offense or a habitual violator offense; and
- (c) The person has been a resident of the Commonwealth for at least five (5) years prior to the date of application for issuance or renewal.
- (4) (a) A person applying for an operator's license under subsection (3) of this section shall submit an application to the Transportation Cabinet in Frankfort or a Transportation Cabinet field office.
- (b) The Transportation Cabinet shall, within fifteen (15) days of receipt of the application, determine if the person is eligible to receive a license under subsection (3) of this section.
- (c) If the Transportation Cabinet determines the person may be issued a license under subsection (3) of this section, the cabinet shall issue the person an official form that the applicant shall present to the circuit clerk of the county where the person resides. Upon receipt of this notice, and completion of any examinations required under KRS 186.480, the circuit clerk shall issue the applicant a license under subsection (3) of this section.
- (5) A person issued a Kentucky operator's license in accordance with subsection (3) of this section shall be issued an operator's license marked "Valid in Kentucky Only" and shall sign a statement that the person understands that he or she may be subject to arrest and detention if stopped by a law enforcement officer in another state while operating a motor vehicle on this restricted license.
- (6) If a person granted a license under subsection (3) of this section satisfies the requirements to have the suspension or revocation in another state lifted, the person shall apply to the circuit clerk to be issued a new license without the restrictions outlined in subsection (3) of this section.
- (7) The provisions of subsection (3) of this section shall not apply to a commercial

driver's license.

**KRS 186.570 Denial or suspension of license – Informal hearing – Appeal – Surrender of certificate – Medical review board – Prohibition against raising insurance on basis of denial or suspension for child support arrearage [Amended 2003 HB 63 Sect. 3]**

\* \* \* \* \*

- (5) (a) The cabinet may suspend the operator's license of any resident upon receiving notice of the conviction of that person in another state of an offense there which, if committed in this state, would be grounds for the suspension or revocation of an operator's license. **The cabinet shall not suspend an operator's license under this paragraph if:**
- 1. The conviction causing the suspension or revocation is more than five (5) years old;**
  - 2. The conviction is for a traffic offense other than a felony traffic offense or a habitual violator offense; and**
  - 3. The license holder complies with the provisions of KRS 186.442.**
- (b) **If, at the time of application for an initial Kentucky operator's license, a person's license is suspended or revoked in another state for a conviction that is less than five (5) years old**~~**If a person so convicted is not the holder of a Kentucky operator's license**~~, the cabinet shall deny the person a license until the person resolves the matter in the other state and complies with the provisions of this chapter.
- (c) The cabinet may, upon receiving a record of the conviction in this state of a nonresident driver of a motor vehicle of any offense under the motor vehicle laws, forward a notice of that person's conviction to the proper officer in the state of which the convicted person is a resident.
- (d) **This subsection shall not apply to a commercial driver's license.**

**KRS 189.550 Vehicles used for transporting children to stop at railroad crossings [Amended 2003 SB 132 Sect. 1]**

Operators of all buses and motor vehicles used for transporting children shall stop their vehicles before crossing any railroad when tracks are at the same level of the roadway. The stop shall be made not less than **fifteen (15)**~~**ten (10)**~~ feet nor more than **fifty (50)**~~**thirty (30)**~~ feet from the nearest track over which the highway crosses, except where the crossing is protected by gates or a flagman employed by the railroad. After making the stop, the operator shall open the service door and carefully look in each direction and listen for approaching trains or maintenance vehicles before proceeding. **If visibility is impaired at the required distance for stopping under this section, the operator may allow the vehicle to slowly roll forward for the purpose of gaining the visibility necessary to safely cross the railroad tracks.**

**KRS 189.930 Right-of-way to emergency vehicles – Blocking or following emergency vehicles – Driving over unprotected hoses of fire department [Amended 2003 HB 15 Sect. 1]**

\* \* \* \* \*

(5) Upon approaching a stationary emergency vehicle or public safety vehicle, when the emergency vehicle or public safety vehicle is giving a signal by displaying alternately flashing yellow, red, red and white, red and blue, or blue lights, a person who drives an approaching vehicle shall, while proceeding with due caution:

(a) Yield the right-of-way by moving to a lane not adjacent to that of the authorized emergency vehicle, if:

1. The person is driving on a highway having at least four (4) lanes with not fewer than two (2) lanes proceeding in the same direction as the approaching vehicle; and
2. If it is possible to make the lane change with due regard to safety and traffic conditions; or

(b) Reduce the speed of the vehicle, maintaining a safe speed to road conditions, if changing lanes would be impossible or unsafe.

(6) This section does not operate to relieve the person who drives an emergency vehicle from the duty to operate the vehicle with due regard for the safety of all persons using the highway.

**KRS 244.085 Minors not to possess or purchase liquor nor to misrepresent age – Use of fraudulent identification – Prohibition against minors remaining on premises where alcoholic beverages sold [Amended 2003 HB 139 Sect. 1]**

- (1) As used in KRS 244.083 and this section: "Premises" has the meaning it is given in KRS 241.010 and also means the place of business of a person licensed to sell alcoholic beverages including, in the case of drive-in establishments, the entire lot upon which the business establishment is situated.
- (2) A person under 21 years of age shall not enter any premises licensed for the sale of alcoholic beverages for the purpose of purchasing or receiving any alcoholic beverages.
- (3) A person under 21 years of age shall not possess for his or her own use or purchase or attempt to purchase or have another purchase for him or her any alcoholic beverages. No person shall aid or assist any person under 21 years of age in purchasing or having delivered or served to him or her any alcoholic beverages.
- (4) A person under 21 years of age shall not misrepresent his or her age for the purpose of inducing any licensee, or the licensee's agent, servant, or employee, to sell or serve any alcoholic beverages to the underage person.
- (5) A person under 21 years of age shall not use, or attempt to use any false, fraudulent, or altered identification card, paper, or any other document to purchase or attempt to purchase or otherwise obtain any alcoholic beverage.
- (6) Except as provided in KRS 244.087 and 244.090, a licensee, or his or her agents, servants, or employees shall not permit any person under twenty-one (21) years of age to remain on any premises where alcoholic beverages are sold by the drink or consumed on the premises, unless:
  - (a) The usual and customary business of the establishment is a hotel, motel, restaurant, convention center, convention hotel complex, racetrack, simulcast facility, golf course, private club, park, fair, church, school, athletic complex, athletic arena, theater, distillery or brewery or winery tour, establishment where prebooked concerts with advance ticket sales are held, **convenience store, grocery store, drug store, or similar establishment** or any facility in which there is maintained in inventory on the

- ~~premises for sale at retail no less than five thousand dollars (\$5,000) of food, groceries, and related products valued at cost~~. For purposes of this paragraph, house bands, disc jockeys, and karaoke are not considered concerts;
- (b) All alcoholic beverage inventory is kept in a separate, locked department at all times when minors are on the premises; or
  - (c) Written approval has been granted by the department to allow minors on the premises until 10 p.m. where the sale of alcohol is incidental to a specific family or community event including, but not limited to, weddings, reunions, or festivals. The licensee's request shall be in writing and shall specifically describe the event for which approval is requested. The state administrator shall approve or deny the request in writing.
- (7) Except as provided in subsection (6) of this section, a licensee or his or her agent, servant, or employee shall not allow any person under the age of twenty-one (21) to remain on any premises that sells alcoholic beverages by the package unless the underage person is accompanied by a parent or guardian or the usual and customary business of the establishment is a convenience store, grocery store, drugstore, or similar establishment.
- (8) Except as provided in subsection (6) of this section, a person under the age of twenty-one (21) shall not remain on any premises that sells alcoholic beverages by the package unless he or she is accompanied by a parent or guardian or the usual and customary business of the establishment is a convenience store, grocery store, drugstore, or similar establishment.

**KRS 522.050 Abuse of public trust [NEW 2003 SB 94 Sect. 1]**

- (1) A public servant who is entrusted with public money or property by reason of holding public office or employment, exercising the functions of a public officer or employee, or participating in performing a governmental function, is guilty of abuse of public trust when:**
- (a) He or she obtains public money or property subject to a known legal obligation to make specified payment or other disposition, whether from the public money or property or its proceeds; and**
  - (b) He or she intentionally deals with the public money or property as his or her own and fails to make the required payment or disposition.**
- (2) A public servant is presumed:**
- (a) To know any legal obligation relative to his or her criminal liability under this section; and**
  - (b) To have dealt with the public money or property as his or her own when:**
    - 1. He or she fails to account upon lawful demand; or**
    - 2. An audit reveals a shortage or falsification of accounts.**
- (3) Abuse of public trust is:**
- (a) A Class D felony if the value of the public money or property is less than ten thousand dollars (\$10,000);**
  - (b) A Class C felony if the value of the public money or property is ten thousand dollars (\$10,000) or more, but less than one hundred thousand dollars (\$100,000); and**
  - (c) A Class B felony if the value of the public money or property is one hundred thousand dollars (\$100,000) or more.**
- (4) The judgment of conviction under this section shall recite that the offender is disqualified to hold any public office thereafter.**
- (5) Conduct serving as the basis for the conviction of a public servant under this section shall not also be used to obtain a conviction of the public servant under KRS 514.070.**

**KRS 514.070 Failure to make required disposition of property [Amended 2003 SB 94 Sect. 2]**

\* \* \* \* \*

- (5) No person shall be convicted of theft by failure to make required disposition of**

property received when he or she has also been convicted of a violation of KRS 522.050 arising out of the same incident.

**KRS 525.135 Torture of a dog or cat [NEW 2003 SB 24 Sect. 1]**

- (1) As used in this section, unless the context otherwise requires, "torture" means the intentional infliction of or subjection to extreme physical pain or injury, motivated by an intent to increase or prolong the pain of the animal.
- (2) A person is guilty of torture of a dog or cat when he or she without legal justification intentionally tortures a domestic dog or cat.
- (3) Torture of a dog or cat is a Class A misdemeanor for the first offense, and a Class D felony for the second and subsequent offenses.
- (4) Nothing in this section shall apply to the killing or injuring of a dog or cat:
  - (a) In accordance with a license to hunt, fish, or trap;
  - (b) For humane purposes;
  - (c) For veterinary, agricultural, spaying or neutering, or cosmetic purposes;
  - (d) For purposes relating to sporting activities including but not limited to training for organized dog or cat shows, or other animal shows in which a dog or a cat, or both, participate;
  - (e) For activities of bona fide animal research activities, using dogs or cats, of institutions of higher education; or a business entity registered with the U.S. Department of Agriculture under the Animal Welfare Act or subject to other federal laws governing animal research;
  - (f) In defense of self or another person against an aggressive or diseased dog or cat;
  - (g) In defense of a domestic animal against an aggressive or diseased dog or cat;
  - (h) For animal or pest control; or
  - (i) For any other purpose authorized by law.
- (5) Activities of animals engaged in hunting, field trials, dog training other than training a dog to fight for pleasure or profit, and other activities authorized either by a hunting license or by the Department of Fish and Wildlife Resources shall not constitute a violation of this section.
- (6) The acts specified in this section shall not constitute cruelty to animals under KRS 525.125 or 525.130.

**KRS 525.130 Cruelty to animals in the second degree [Amended 2003SB 24 Sect. 2]**

- (1) A person is guilty of cruelty to animals in the second degree when except as authorized by law he intentionally or wantonly:
  - (a) Subjects any animal to or causes cruel or injurious mistreatment through abandonment, participates other than as provided in KRS 525.125 in causing it to fight for pleasure or profit, (including, but not limited to being a spectator or vendor at an event where a four (4) legged animal is caused to fight for pleasure or profit) mutilation, beating, torturing any animal other than a dog or cat, tormenting, failing to provide adequate food, drink, space, or health care, or by any other means; or
  - (b) Subjects any animal in his custody to cruel neglect; or
  - (c) Kills any animal other than a domestic animal killed by poisoning. This paragraph shall not apply to intentional poisoning of a dog or cat. Intentional poisoning of a dog or cat shall constitute a violation of this section.
- (2) Nothing in this section shall apply to the killing of animals:
  - (a) Pursuant to a license to hunt, fish, or trap;
  - (b) Incident to the processing as food or for other commercial purposes;
  - (c) For humane purposes;
  - (d) For veterinary, agricultural, spaying or neutering, or cosmetic purposes;
  - (e) For purposes relating to sporting activities, including but not limited to horse racing at organized races and training for organized races, organized horse shows,

- or other animal shows;
- (f) For bona fide animal research activities of institutions of higher education; or a business entity registered with the U.S. Department of Agriculture under the Animal Welfare Act or subject to other federal laws governing animal research;
- (g) In defense of self or another person against an aggressive or diseased animal;
- (h) In defense of a domestic animal against an aggressive or diseased animal;
- (i) For animal or pest control; or
- (j) For any other purpose authorized by law.
- (3) Activities of animals engaged in hunting, field trials, dog training~~[-]~~ **other than training a dog to fight for pleasure or profit**, and other activities authorized either by a hunting license or by the Department of Fish and Wildlife shall not constitute a violation of this section.
- (4) Cruelty to animals in the second degree is a Class A misdemeanor.

# KENTUCKY CASE LAW

## Court of Appeals – Supreme Court

**Spears v. Comm.**  
**78 S.W.3d 755 (Ky. App., 2002)**

**FACTS:** On August 23, 1999, Joe Miller, an Amish farmer in Fleming County, heard noises from his barn. Looking out, he saw three people taking items from his barn. When they drove away, Miller hurried to his barn and discovered a number of items missing. He traveled by buggy to his neighbor's home, contacted the Fleming County Sheriff's Office, and returned to his own home (apparently accompanied by the neighbor) to wait for the deputies.

Deputy Catron arrived, interviewed Miller and completed a theft report. Shortly afterward, Miller and Endicott (the neighbor) observed a pickup truck drive by; the truck's occupants were yelling and honking the horn loudly. After the third pass-by, Endicott followed the vehicle in his own truck. Eventually, the truck pulled to the side, and Endicott passed; they pulled out to follow Endicott. In fear, Endicott drove toward the home of another deputy, Robinson, but before Endicott arrived at Robinson's home, the truck went in another direction.

Deputy Robinson and Endicott headed out to search for the truck, finding it at a convenience store. Pulling in, they saw several items in the truck bed, covered by a tarp. Someone shouted, "the law's here," and Spears ran in front of the truck

and through the lot. Robinson chased and caught Spears. During that time, two other individuals fled the scene in the pickup, and neither the truck nor the suspects were ever located.

Patting down Spears, Robinson found a broken padlock and a set of artificial knuckles. Investigating the area, Robinson found that the lock had come from an old truck trailer the convenience store used for storage. On the ground nearby, the deputy found another lock, taken from a storage building, and a pair of pliers, later identified and claimed by Miller.

Spears was placed in the back seat of Robinson's car. Deputies Catron and Vice arrived, and Vice and Robinson left, in Vice's cruiser, to look for the truck. Catron decided to transfer Spears to his car, but noticed that Spears' position in Robinson's vehicle was odd; he had both feet up on the seat. After transferring him, Catron searched the back seat of Robinson's car and found a baby sock containing crack cocaine. Robinson later stated that he had searched his vehicle after his last transport, two days before, and that no one else had been in the back seat.

Spears was convicted on a variety of drug and burglary charges. He appealed, stating that there was insufficient evidence and that the

facilities (barn, trailer and storage shed) were not “buildings” for burglary purposes.

**ISSUE:** Are barns, storage trailers and sheds considered to be buildings for burglary?

**HOLDING:** Yes

**DISCUSSION:** The Court addressed each of the burglaries. The barn was clearly a building, and that conviction was upheld. The trailer and shed were also found to be buildings, since employees and suppliers of the convenience store would “come together” in those locations “for purposes of business.” The Court stated that “common sense dictates that a trailer or shed that is being used by a business as a storage facility in lieu of a storage building meets the definition of building under the statute.”

The Court also found sufficient evidence that the jury could find that Spears had been in possession of the crack cocaine.

**Robertson v. Comm.**  
**82 S.W.3d 832 (Ky., 2002)**

**FACTS:** On Jan. 4, 1998, Officer Brian Kane, Covington Police Department engaged in a foot pursuit chasing Shawnta Robertson. Robertson was suspected of marijuana possession. Kane radioed for assistance. As Kane and Robertson ran onto the Clay Wade Bailey Bridge across the Ohio River, Officers Michael Partin, Steve Sweeney and Cody Stanley joined Kane. At that time, Robertson and

Kane were running on the pedestrian walkway alongside the roadway.

Partin drove his car past Robertson, who turned and ran back toward Kane. At Kane’s order, Robertson dropped to his knees and submitted. As Kane handcuffed Robertson, he saw movement in his peripheral vision and “heard a voice say that ‘somebody’s off the bridge.’” Both Stanley and Sweeney testified that they saw Partin leave his vehicle and vault over the barrier (to assist Kane on the walkway) and disappear. There was a forty-one inch wide open space between the highway barrier and the walkway barrier, and Partin fell through this barrier to the Ohio River, ninety-four feet below. His body was recovered four months later.

Robertson was charged and convicted of manslaughter in the second degree, for wantonly causing Partin’s death. He appealed.

**ISSUE:** May a defendant be held criminally responsible for the actions of a third party, if those actions can be reasonably predicted to occur as a result of the defendant’s actions?

**HOLDING:** Yes

**DISCUSSION:** Robertson argued that since Partin’s act (vaulting over the barrier) was by his own choice, that he could not be held responsible for his death. However, the Court explored the meaning of wanton, and held that Partin’s action was a “reasonably foreseeable consequence of the unlawful act of” Robertson, in failing to submit

immediately to Kane's attempt to arrest and when it was obvious that Partin was in pursuit as well, and would be required to vault over the space to assist Kane.

**Comm. v. Stephenson**  
**82 S.W.3d 876 (Ky., 2002)**

**FACTS:** On April 17, 1999, Stephen Stephenson was spotted speeding through Jefferson County, Kentucky. Officers attempted to stop him, but he fled across the bridge over the Ohio River into New Albany, Indiana, where he was eventually stopped. New Albany officers arrested Stephenson and charged him with DUI under Indiana law, and he pled guilty under an agreement. Under that agreement, he served jail time in Indiana, and then had his probation transferred to Kentucky authorities, while undergoing inpatient alcohol treatment. Kentucky also suspended his operator's license as a result of the Indiana conviction.

Kentucky then filed criminal charges, including a Kentucky DUI charge, against Stephenson. The Jefferson County District Court dismissed the charges, with the agreement of the County Attorney, noting on the case jacket that "Duplicate Charges [were] Prosecuted in New Albany." However, the Commonwealth's Attorney sought and received a direct indictment for First Degree Fleeing or Evading Police, DUI (fourth offense) and Operating a Motor Vehicle with a license suspended for DUI (first offense). Stephenson appealed on the grounds of double jeopardy, and the trial court denied the motion. He

requested a writ of prohibition, and the Court of Appeals gave him partial relief, prohibiting the DUI prosecution, but allowed the other charges to go forward. The Commonwealth appealed the dismissal of the DUI charges.

**ISSUE:** Does Double Jeopardy attach when a person is charged with DUI in two states, for the same continuous act of driving?

**HOLDING:** No

**DISCUSSION:** The Supreme Court reinstated all of the charges originally placed against the defendant. The Court found that double jeopardy did not attach, as Stephenson was not charged based upon the same conduct that was considered in the Indiana courts. In effect, he was being prosecuted in Kentucky for driving under the influence in Kentucky, while Indiana prosecuted him for the same conduct, driving under the influence, while on Indiana soil. Each jurisdiction, "as an independent sovereign, has the power to enforce its own criminal laws...."

**McClure v. Augustus**  
**85 S.W.3d 584 (Ky., 2002)**  
**as modified**

**FACTS:** On July 21, 1998, Sheriff Augustus of McCracken County fired Deputy Ronald McClure. McClure requested a hearing before the Deputy Sheriff Merit Board, which had been established pursuant to KRS 70.260(1). Before the hearing could take place, however, Sheriff Augustus requested an injunction

and declaration of rights. The Circuit Court found the Merit Board statutes unconstitutional.

**ISSUE:** May a sheriff terminate a deputy sheriff in contravention to the order of the Deputy Sheriff Merit Board?

**HOLDING:** No

**DISCUSSION:** The Kentucky Supreme Court discussed the issue of how the common-law authority (such as the authority of a sheriff to fire a deputy sheriff) may be removed from one executive authority (the sheriff) and given to another entity (the merit board). The Court stated that such functions are subject to the will of the General Assembly and upheld the deputy's position.

**NOTE:** *This opinion supersedes the previous opinion issued in this case, which was reported in the 2001-02 Legal Update. Also note that this opinion only applies to counties that have deputy sheriff merit boards.*

**Campbell v. City of Booneville**  
**85 S.W.3d 603 (Ky., 2002)**

**FACTS:** On March 2, 1999, Officer Campbell, Booneville Police Department, was not scheduled to work. Instead, he worked at a second job, until 4 p.m. He went home and drank 5-6 cans of beer. At approximately 7 p.m., he was called at home by an unidentified female complaining of someone driving recklessly through town. He explained he was off duty, and suggested that she call the sheriff's

office. (He was the only police officer in town at that time.) She called back several times, and threatened to complain to the city council if he continued to refuse to take action. At about 8 p.m., he went out in search of the offending vehicle. About two hours later, he spotted a vehicle that matched the description, a chase ensued, and shots were fired at him. The vehicle escaped, and he notified the state police and the sheriff's office, which responded.

A little later, he stopped another vehicle for traffic violations, and the driver of the vehicle appeared to be intoxicated. Again, a chase ensued, at speeds estimated as exceeding 100 miles per hour, over wet roads. Campbell stated that he had decided to stop his pursuit when shots were fired at him from the vehicle. Again he notified the sheriff's office, and returned fire, at one point driving with one hand and reloading with the other. Eventually, he lost control of his vehicle, crashed and was injured. Although he had the identity of the other driver, he had the driver's operator's license, that driver was never arrested.

At the hospital, Campbell's blood alcohol was a .14, forty minutes after the wreck, and he also tested positive for Valium, for which he was prescribed. He was charged with DUI and fired. In addition, the city argued that they bore no liability for his injuries, which he claimed under worker's compensation. Campbell argued that the city needed to have testimony to the effect that intoxication was the primary cause of

the crash, and Campbell pointed out that he had been driving successfully for several hours prior to the chase and that he was permitted to engage in pursuits.

The Administrative Law Judge (ALJ) noted that Campbell's own testimony indicated he had been drinking, and that his blood alcohol was considerably above the limit where impairment was legally presumed. The ALJ found that voluntary intoxication was the "proximate cause" of the wreck and Campbell's injuries. Subsequent appeals affirmed the ALJ's decision. Campbell continued his appeal to the Supreme Court.

**ISSUE:** May a police officer's injuries attributed to voluntary intoxication (while performing police duties) be covered by workers' compensation?

**HOLDING:** No

**DISCUSSION:** The Court concluded that despite Campbell's best efforts, they were not convinced that the employer's defense of voluntary intoxication, as a bar to worker's compensation benefits, requires that an absolute determination as to primary proximate cause be made. The Court found that sufficient evidence existed on the record to find that Campbell's intoxication was the primary cause of the wreck and affirmed the holdings of the lower courts.

**Comm. v. Plowman**  
**86 S.W.3d 47 (Ky., 2002)**

**FACTS:** Plowman was indicted for second-degree arson, for burning a bulldozer. He appealed the indictment, claiming that the bulldozer was not legally a vehicle, therefore the charge was incorrect and should be dismissed.<sup>1</sup> The Circuit Court and the Court of Appeals agreed that it was not a vehicle, under that statute. The sole issue, on appeal, is whether a bulldozer qualifies as a vehicle within the definition of building, for the purposes of KRS 513.030.

**ISSUE:** Is a bulldozer a vehicle for the purposes of arson?

**HOLDING:** Yes

**DISCUSSION:** The Court addressed several amendments to the original arson statute enacted in 1974, and concluded that the definitional statute for arson "does not place a limitation on the purpose for which the vehicle is used in order to determine if the conveyance is a vehicle."

**Hughes v. Comm.**  
**87 F.3d. 850 (Ky., 2002)**

**FACTS:** On January 3, 1999, Lexington-Fayette police officers found Keisha Hughes, deceased, in the apartment she shared with her husband, Troy Hughes, and her two

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<sup>1</sup> Apparently he was basing this argument on KRS 189.010 (19), which exempts bulldozers from classification as a motor vehicle. Instead, it would be classified as a "vehicle which is not a motor vehicle."

children.<sup>2</sup> The agency had received a call from Keisha's mother, Ella Woodward, in Louisville, stating that her daughter had not arrived to pick up her children as expected, and gave the officers the address. She also reported that her daughter and son-in-law had marital problems. Officer Varney went to the apartment. Troy Hughes reported that his wife was asleep and did not wish to be disturbed. This information was relayed to Woodward; she was dissatisfied.

A little later, Officer Dials went to the apartment and knocked repeatedly, with no response. The officer smelled a foul odor, and originally thought it was from baby diapers. He asked the apartment manager to open the door and also asked about babies: he was told there were no babies in diapers in the apartment. The manager unlocked the door, and Dials immediately "encountered a rush of extremely hot air permeated with the same foul odor." He immediately believed the odor to be that of decomposing remains. He found Keisha's body in a back bedroom. He immediately secured the apartment.

Later that same day, Troy Hughes was arrested, after a brief pursuit. The arresting officer, Lynn, advised Hughes of his rights and transported him to police headquarters to be questioned by a homicide detective. Approximately an hour after his arrest, Det. Lyons began an interrogation. Troy Hughes did not argue that he had not been given his

rights, nor did he argue that he did not understand them.<sup>3</sup> Instead, he argued for a bright-line rule that Miranda must be given upon any delay in the questioning, and when a different interrogator becomes involved.

Hughes confessed and entered a conditional guilty plea to the strangulation murder. However, he appealed on several issues, among them that the body was found during a illegal warrantless search and that his confession should be suppressed because his Miranda rights were given to him by someone other than his interrogator..

**ISSUE:** 1) May an officer make an emergency entry when the officer believes there to be an emergency inside?

2) Must Miranda be given by the interrogator?

**HOLDING:** 1) Yes  
2) No

**DISCUSSION:** The Court found the entry to be reasonable, and based upon sufficient cause. The Court also found that since the victim's brother arrived shortly after the officer, and stated that he would have entered the apartment had the officer not already done so; it was inevitable that the body would have shortly been found anyway.

As to the confession, the Court simply dismissed Hughes' arguments, stating that his

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<sup>2</sup> These children were not shared with Troy Hughes.

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<sup>3</sup> Hughes had three prior felony convictions.

“confession was not compromised by the failure to readvise him....”

**Auto Acceptance Corporation v. T.I.G. Insurance Co.**  
**89 S.W.3d 398 (Ky., 2002)**

**FACTS:** On January 21, 1997, Wayne Chandler entered into a retail sales contract to purchase an Acura automobile from J.D. Byrider.<sup>4</sup> He applied for the title and registration for the vehicle. He gave Byrider a proof of insurance card for another vehicle, for a policy with T.I.G. Insurance Co. That policy allowed Chandler to add a vehicle to his coverage within 30 days of buying a vehicle. He drove the vehicle home.

Byrider received the title from the previous owner, on January 30, and presented the transfer documents to the Hardin County Clerk, on February 4. However, on January 22, Chandler was involved in a collision with Sharon Peege. He reported the collision to T.I.G., but T.I.G. claimed they had no responsibility for the wreck because he had not yet added the vehicle to his policy. They also argued that they had no liability because Chandler was not yet the owner. Both parties asked for summary judgment, and the Court awarded summary judgment to Byrider, holding that Chandler was the owner for insurance purposes, but then reversed itself at trial, holding that Byrider was the owner of the vehicle, awarding summary judgment to T.I.G. Byrider appealed, and the Court of Appeals affirmed the trial

court’s judgment. Byrider further appealed.

**ISSUE:** Who actually owns a vehicle for insurance purposes, the title owner or the new buyer?

**HOLDING:** The new buyer.

**DISCUSSION:** The Court addressed KRS 186A.220, and found that the 1994 revision to that statute created an exception to the usual rule, which is that ownership follows title. The Court found that a car dealer can take advantage of the exception by verifying that the buyer has “a valid and current insurance policy that covers the purchased vehicle,” and Byrider did. The Court ordered that Chandler was the owner of the vehicle at the time of the collision.

**Johnson v. Comm.**  
**90 S.W.3d 39 (Ky., 2002)**

**FACTS:** About September 28, 1998, Sgt. Henley, Newport P.D., received information from a CI<sup>5</sup> that Johnson was selling Percocets, a prescription painkiller, and that he was in possession of stolen property. As a result, the Newport P.D. made a series of controlled buys of Schedule II narcotics from Johnson and another man, during the month of October.

In the first buy, Sgt. Henley and Corporal Murphy met the CI in his apartment parking lot, searched him and wired him. He was given \$150 to purchase the drugs. The CI returned to his apartment and paged

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<sup>4</sup> The plaintiff does business as J.D. Byrider.

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<sup>5</sup> Confidential Informant

Johnson, with the two officers listening from outside. Johnson and the CI agreed to meet in the parking lot, and minutes later, a brown Mercury arrived and met the CI. Henley later testified that he recognized the vehicle as belonging to Johnson and that he recognized Johnson as the driver. After a brief conversation and the transaction, Johnson left. The CI gave the officers 12 Percocets, \$2 and the wire equipment. A second transaction occurred on October 22, with the officers meeting the CI in a motel parking lot. The same procedure was followed, and the CI was given \$60 to make the purchase. The CI went to Johnson's home nearby, made the transaction, and returned to the parking lot with 5 white tablets.

Apparently, the next day, Henley drafted a search warrant affidavit for a search of Joan Walters home. Walters was Johnson's ex-wife, and it appeared to the officers that Johnson lived with her. The warrant sought a variety of drugs, records, cash, stolen property and paraphernalia. During the search, the police seized Schedule II narcotics, four firearms, food stamps and some goods they suspected were stolen. Johnson, however, was arrested elsewhere.

Johnson was convicted of a variety of charges, including illegal possession of a handgun by a convicted felon. He argued at trial that he was not in possession of the firearm, since it was not "his" home, but the jury found that he was in constructive possession. He had

resided in the home for five years, he was a convicted felon and three handguns and a shotgun, with ammunition, were found at the home. Walters testified that she was the legal owner of the weapons, and Johnson stated that he only occasionally stayed with Walters, was not arrested at Walters' home, and had, in fact, another residence. Johnson also objected to the inclusion of the shotgun in the consideration of the evidence, since his previous conviction predated the time when a shotgun would have been prohibited by the statute.<sup>6</sup> The Court disagreed, and held that the jury could consider the shotgun in light of the other weapons found.

Johnson also objected to the validity of the search warrant, but for procedural reasons, the Court did not review the warrant. Finally, Johnson objected to the admission of the audio tapes, large portions of which were apparently inaudible, and argued that the trial court should have reviewed the tapes prior to allowing them to be played for the jury. However, the court found that while the trial court did fail to exercise its discretion to listen to the tapes, that the failure to do so was not error. In fact, the Court found that "the tapes were not so incomprehensible as to the (sic) render them wholly untrustworthy."

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<sup>6</sup> KRS 527.040(4) stated that "[t]he provisions of this section with respect to handguns shall apply only to persons convicted after January 1, 1975, and with respect to other firearms, to persons convicted after July 15, 1994. Johnson's previous conviction was on November 3, 1993.

**ISSUE:** May a person be found to be in constructive possession of a weapon in a home where they do not reside full time?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed with the trial jury that constructive possession “exists when a person does not have actual possession but instead knowingly has the power and intention at a given time to exercise dominion and control of an object, either directly or through others.”<sup>7</sup> The Court upheld the conviction.

**Comm. v. Whitmore**  
**92 S.W.3d 76 (Ky., 2003)**

**FACTS:** Police officers went to a residence in Jefferson County to serve a warrant. There they found six people, including Whitmore. One of the officers recognized that Whitmore fit the description of an individual wanted for questioning in an assault. As the officer spoke to Whitmore, she observed that he had his hand in his jacket pocket, and was “fidgeting around.” He was turned away from the officer “so she could not see exactly what he was doing with his hands.” She asked his name, and he gave her “Mike,” which was not correct. She asked him to stand up and take his hands out of his pocket, which he refused to do. Finally, he did stand, and the officer did a pat down search.

In his right front jacket pocket, she felt a bulge that she recognized to be a bag of crack cocaine. She later

described the “bulge as round and hard with edges that protruded.” The officer had experience with previous drug arrests.

Whitmore was arrested. The officer conducted a full search and found 20-25 pieces of crack, individually wrapped and further contained in a plastic bag.

The trial court refused to suppress the evidence, holding that the situation fell within the “plain feel” rule.

Whitmore was convicted, and appealed, arguing that a “simple bulge” was not sufficient.

**ISSUE:** May crack cocaine found during a pat down constitute probable cause for an arrest?

**HOLDING:** Yes (see discussion)

**DISCUSSION:** The Court found that there exists a “narrowly drawn exception” to the general requirement for a warrant, when “nonthreatening contraband is immediately apparent from a sense of touch.” In this situation, the officer had experience with drug arrests, the jacket was very light, and she was able to describe “the amount, the shape and the packaging and the unique feel of the substance.” The crack was not inside any container that “shielded its identity.” The Court reversed the opinion of the Court of Appeals and reinstated the conviction.

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<sup>7</sup> Quoting U.S. v. Garrett, 903 F.2d 1105 (7<sup>th</sup> Cir, 1990)

**Irvin v. Aubrey**  
**92 S.W.3d 87 (Ky. App., 2003)**

***On a procedural note, this case was originally filed in state court. The sheriff removed the action to federal court, but the deputy requested and received a remand back to the state court. The sheriff appealed that remand, but the court denied the appeal. The sheriff requested and received a summary judgment, and the deputy appealed this decision to the Kentucky Court of Appeals.***

**FACTS:** Deputy Irvin, an African-American male, started as a deputy sheriff with the Jefferson County Sheriff's Office in 1995. Initially, he worked at the entrance to the courthouse. He was next assigned to the transportation unit, at his request. Some time later, he was assigned to work in a particular courtroom, again at his request.

Deputy Irvin is also a minister, and obligated to attend church every Sunday morning. His assignments at the courthouse presented no conflict, because he was not required to work on Sunday. In 1996, however, he requested a transfer to the "criminal unit," which serves emergency protective orders. Since this position requires 24-hour coverage, he could not be guaranteed Sunday mornings off, and he declined the transfer.

Shortly thereafter, he filed a complaint with the Kentucky Commission on Human Rights and the Equal Employment Opportunity Commission. He then withdrew

these complaints, and filed suit in Jefferson Circuit Court, alleging religious and racial discrimination.<sup>8</sup> Eventually, the court entered summary judgment in favor of the sheriff's office.

**ISSUE:** Must a law enforcement agency make a religious accommodation to allow an employee to avoid Sunday work duties?

**HOLDING:** Not necessarily

**DISCUSSION:** The trial court resolved the issue based upon a "reasonable accommodation" theory, and held that while employers are required to make reasonable accommodations, that it is only required when there is no "undue hardship" to the employer (and other employees) to do so. The trial court had found that Irvin had "multiple opportunities" to be assigned to positions that did not require Sunday work. When he declined the assignment he had requested, he was allowed to stay in his original position, at the same rank and pay. Irvin had made no attempt to suggest any way he could be accommodated that did not unduly impact upon other deputies. Irvin had also argued that a white deputy who was also a minister held a position in the civil process unit that did not require Sunday work, as they did not have a shift working at that time. As such, the Court found his argument to be irrelevant. (In fact,

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<sup>8</sup> Originally, the lawsuit was against Sheriff James Vaughn, who was replaced as party defendant by Sheriff John Aubrey in 1999.

eventually Irvin requested and was transferred to that unit.)

As such, the appellate court upheld the dismissal of the lawsuit in favor of the sheriff.

**Mills v. Comm.**  
**95 S.W.3d 838 (Ky., 2003)**

**FACTS:** On July 27, 2003, a gas station attendant, Brandon Gray, saw two men approaching from a nearby car wash. At the same time, a blue van pulled up to the pumps, and Gray serviced that van – its two occupants entered the station. After the van left, the two men approached Gray, and the larger man put him in a “headlock.” Gray struggled, and the smaller man pulled out a pocketknife and threatened him, but never opened the knife. Gray gave them approximately \$100, and they left.

Later, Gray identified Harold Mills and his brother, Ricky Mills from a photo. He was also shown photos of the pair by a friend, Richard Honeycutt – the Mills were Honeycutt’s uncles. Other witnesses also testified both against the Mills brothers, and in their favor, with Ricky’s girlfriend testifying they were at her apartment during the time of the robbery. The Mills were both convicted of first-degree robbery.

The Mills brothers appealed on several issues, only one of which is relevant to law enforcement officers.

**ISSUE:** Are notes taken by a law enforcement officer during an

investigation discoverable by the defense?

**HOLDING:** Yes

**DISCUSSION:** The investigating officer had finally provided his written notes to the defense, pursuant to a trial court order, and the notes revealed a possible witness who stated she was present at the time of the robbery. Because the defense did not learn of these notes until trial, and because the named witness was not immediately available, the Court found that this failure warranted at the least, a continuance of the trial to allow the witness to be located.

**James v. Wilson**  
**95 S.W.3d 875 (Ky. App., 2003)**

**FACTS:** This case revolves around the events of December 1, 1997, when Michael Carneal entered Heath High School, in McCracken County, and opened fire, killing 3 and wounding 5 of his classmates. Parents of the 3 murdered students brought suit against 53 defendants, including Carneal, his parents, students and school personnel.<sup>9</sup>

One issue involves the potential negligence of the owner of the .22 rifle Carneal used, Wendall Nace. It is undisputed that the owner kept the weapon in a case, unloaded, in his home and that Carneal stole the weapon. Carneal separately broke into an outbuilding and stole the necessary ammunition.

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<sup>9</sup> Only the issues of relevance to law enforcement officers are included in this summary, the actual opinion, however, discusses a myriad of other issues.

A second issue is negligence on the part of Carneal's parents. While Carneal had committed other minor criminal acts, the Court found no evidence that his parents disregarded any indications that their son might commit homicide.

A third issue relates to the knowledge of several of Carneal's classmates, that Carneal had brought weapons to school in the past, with the plaintiffs stating that the students had an affirmative duty to report Carneal's actions.

A fourth issue relates to a group of students who "played an active role in the development of" Carneal's plan. These students had variously been at the scene of the shootings, talked about plans to "take over the school," used ear plugs, permitted Carneal to hide guns in a room controlled by a fellow student, and engaged in target practice with Carneal. The question concerns whether any of these actions constitute a conspiracy by the students involved. The only concrete evidence concerning the alleged conspiracy came from Carneal himself, in post-arrest statements to a deputy and a forensic psychiatrist, and those statements were held to be inadmissible.

A fifth issue involves the degree of immunity to be accorded to school personnel against whom allegations are made, in their individual capacity.

**ISSUE:** 1) Is there a general duty to protect or warn others of impending harm?

2) Is there a general duty to keep weapons safe from theft and/or to keep weapons and ammunition separate?

3) May conspiracy be proved just by the statements of one of the alleged conspirators?

**HOLDING:** 1) No  
2) No  
3) No

**DISCUSSION:** With regards to the issue of Nace's negligence, the Court stated that a gun owner was "under no duty" to anticipate a theft of either a gun and ammunition. In fact, the Court stated that even had the weapon been kept loaded, it was not inherently negligent to have a weapon in that condition.

On the second issue, the Court found no evidence that Carneal's parents were negligent, or that they disregarded any indication that their son might commit homicide.

On the third issue, the Court engaged in a lengthy discussion of the status of duty to protect. Absent specific statutory provisions, the court found that there is no legal duty to protect or warn others of impending harm. In fact, "in the context of the circumstances as they were at the time rather than with the benefit of hindsight," the court was unwilling to state that the harm was in any way foreseeable.

On the fourth issue, the plaintiffs introduced four separate theories under which the court could consider Carneal's statements as admissible hearsay: admission against interest, adoptive admission, declarant unavailable as a witness and statements made during the course and in furtherance of a conspiracy. The Court, however, denied that the any of the exceptions applied and excluded the statement.

On the fifth issue, the Court determined that since the actions alleged by the plaintiffs involved a variety of seemingly unrelated incidents, and that no single school official would have been aware of a majority of them, that each teacher was making a discretionary choice. The Court acknowledged that "viewed in isolation, none of these events serve as 'warning signals' of a propensity for the type of violence" that occurred. As a result, the Court found all of the school officials immune from liability.

**Comm. v. Hale**  
**96 S.W.3d 24 (Ky., 2003)**

**FACTS:** While on federal work release, Hale committed a felony in Kentucky, for which he was sentenced to four years incarceration. After his trial and sentencing in Kentucky, Hale was turned over to federal authorities to continue serving his federal sentence. However, the detention center had no court order to that effect. At the conclusion of his federal sentence, Hale was returned to Kentucky to serve his state sentence. Hale filed a habeas

corpus petition, arguing that when he was turned over to the federal authorities, Kentucky forfeited its right to have him serve his state sentence – the "Forfeiture of Sentence Rule" articulated in Jones v. Rayborn.<sup>10</sup> Both Laurel County Circuit Court and the Kentucky Court of Appeals upheld the habeas petition, and the Commonwealth requested a review.

**ISSUE:** Does Kentucky forfeit its right to enforce a sentence by releasing a suspect to another jurisdiction to complete a sentence?

**HOLDING:** No

**DISCUSSION:** The Court engaged in a lengthy review of the history of the Jones case, and concluded that the Jones "rule" was "simply an antiquated, judicially-created policy" and formally abandoned it. The Court then denied Hale's request for habeas corpus and release.

**Burchett v. Comm.**  
**98 S.W.3d 492 (Ky., 2003)**

**FACTS:** On December 12, 1997, Sherman Darnell was killed in a collision with Burchett's vehicle, in Green County. Darnell had the right of way; Burchett failed to stop and was held at fault in the collision. Burchett originally denied running the stop sign, but physical evidence at the scene indicated he had, in fact, skidded through the intersection. At the time, Burchett was going to the hospital to visit his girlfriend, Melissa Grider, and their new child. On the day of the

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<sup>10</sup> Ky. 346 S.W.3d 743 (1961).

collision, Grider had left a message at Burchett's place of employment, summoning him to the hospital "as soon as he finished work." Burchett left his workplace shortly after receiving the message.

Trooper Whitlock investigated the collision. He found an unopened, half-gallon, container of vodka in the vehicle, but Burchett denied having been drinking that day. Burchett was treated for minor injuries that occurred during the collision; he told the nurse that he drank a large quantity of vodka daily and smoked two joints a day, but denied having smoked any marijuana on that day in particular. He admitted to a lab tech, however, that he had smoked marijuana that morning. A urine test taken that day revealed the presence of THC, as well as traces of Valium and Tylenol 3, but the amount of blood test was insufficient to test for that purpose. The blood did indicate, however, that he had no alcohol that day. Testimony by hospital personnel indicated that he did not have a prescription for the Valium and Tylenol 3, but that he took them for a medical condition, and that his reports of marijuana usage that day were conflicting. He did admit to having smoked a joint the day before, while on the way to the hospital with his laboring girlfriend.<sup>11</sup>

Burchett was eventually convicted of reckless homicide, having originally been indicted on second-degree manslaughter. He argued that evidence concerning his "habitual"

usage of marijuana was inadmissible.

**ISSUE:** May evidence as to a suspect's "habitual behavior" be introduced in court against the suspect?

**HOLDING:** Sometimes

**DISCUSSION:** The Court examined the rules of evidence with regards to evidence and testimony related to habitual behavior. The Court pointed out that evidence of habit tended to be highly persuasive. The Court stated that this particular case "ferrets out the dangerous non sequitur that the habit evidence rule encourages; because a defendant regularly performs a particular act, he did so on this particular occasion." The Court pointed out that the prosecution did not attempt to introduce Burchett's testimony that he regularly drank a large quantity of vodka each day, in the face of clear evidence that he had not had any alcohol on the day of the wreck, while attempting to introduce his testimony about daily marijuana use as evidence that he had smoked that day, although the evidence as to THC was questionable.

**Comm. v. Mattingly**  
**98 S.W.3d 865 (Ky., App., 2003)**

**FACTS:** The facts in this case were not disputed. On Feb. 18, 2000, Mattingly was charged with DUI, first offense. Prior to the trial, the prosecution stated that it had elected to pursue a DUI *per se*, and produce only evidence to show that Mattingly had a blood-alcohol of over .10 on

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<sup>11</sup> Grider drove herself to the hospital, with Burchett as a passenger.

the date in question, and was operating a motor vehicle at the time.<sup>12</sup> The prosecution moved to exclude all evidence of the stop itself, including the field sobriety tests. Mattingly opposed the motion. The trial court denied the motion, and Mattingly entered a conditional plea. The Marion Circuit Court reversed, and ordered that the evidence concerning the stop be considered. The prosecution requested discretionary review from the Court of Appeals, which was granted.

**ISSUE:** Are issues relating to the original traffic stop and field sobriety tests subject to review at trial, when the charge is a *per se* DUI?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed earlier holdings, stating that they had come “full circle” in how DUI prosecutions would be handled. In this situation, the Court did not agree that any evidence relating to the field sobriety tests, for example, would never be relevant in a *per se* prosecution, stating that it was certainly permissible for the defendant to introduce evidence that might refute the accuracy of the Intoxilyzer. The case was returned to the District Court for reconsideration.

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<sup>12</sup> For reasons unexplained, however, originally Mattingly was charged with operating a vehicle at a BA over .02 – operator under 21.

**Merriweather v. Comm.**  
**99 S.W.3d 448 (Ky., 2003)**

**FACTS:** On February 14, 2001, Merriweather and Wadley broke into the home of Stephanie Case and Chad Bridgewater. When the burglary occurred, in the late evening hours, only Case and their toddler daughter were in the house. Case testified that when the men came to the door of her bedroom, she pulled the cover over herself and her daughter, told the men that she had not seen them and asked them to leave. (In fact, that was not the case; she later testified that she had clearly seen both men.) They left.

Case immediately called police, who responded. Within a short time, they had apprehended both men, along with a third man who had been supposed to pick them up after the burglary.

Merriweather and Wadley were taken to the Adair County trial commissioner’s officer, where Case was filing the criminal complaint. Case went out to the squad car where she positively identified the two as the burglars.

Both men were convicted on a variety of charges. They appealed, arguing, among other things, that the show-up was too suggestive

**ISSUE:** Are show-ups admissible?

**HOLDING:** Yes

**DISCUSSION:** The Court analyzed the situation based upon the five

factors in Neil v. Biggers.<sup>13</sup> and found that there was sufficient reliability so as to admit the evidence. (In fact, Wadley eventually testified against Merriwether and admitted their presence in the house.)

**Barnett v. Wiley**  
**103 S.W.3d 17 (Ky., 2003)**

**FACTS:** On February 21, 2000, Wiley requested a DVO<sup>14</sup> against Barnett, stating that he had “approached her car, banged on the window, threatened to kill her, and followed her in his vehicle in a reckless manner....” At the hearing, Wiley “testified that she was not related to Barnett, had no children in common with him, and had never lived with him.” The trial court issued the protective order against Barnett.

Barnett moved to have the order dismissed, stating that since they were not an “unmarried couple” under Kentucky law, Wiley did not have standing to seek a DVO. The trial court rejected the argument, and Barnett requested a reconsideration. The trial court issued conclusions of law to the effect that expanding the definition of “unmarried couple” to include a dating couple was sound public policy.

The Court of Appeals affirmed the trial court, although one member dissented, arguing that the plain language of the statute left no room to construe a dating relationship as

fitting the definition of an “unmarried couple.”

**ISSUE:** May a couple in a dating relationship be defined as being an “unmarried couple” for purposes of the domestic violence statutes?

**HOLDING:** No

**DISCUSSION:** The Court explored what it truly means to “live together” or cohabit. Since there are no Kentucky cases that define the terms, the Court looked to other states for assistance. The Court looked with approval on the six factors the Iowa court outlined in State v. Kellogg<sup>15</sup> to determine if a couple was cohabiting. The factors include: sexual relations between the parties while sharing the same living quarters, sharing of income or expenses, joint use or ownership of property, holding themselves out as man and wife, the continuity of the relationship and the length of the relationship. The Court stated that under the plain language of the statute, a couple must be found to be truly “living together” before a DVO may be issued, and since that evidence was lacking in this case, the Franklin Family Court was ordered to vacate the DVO.

**Lovett v. Comm.**  
**103 S.W.3d 72 (Ky., 2003)**

**FACTS:** On February 2, 2000, Det. DeFew of the Marshall County Sheriff’s Office received information from a CI that Lovett was manufacturing methamphetamine at his home. DeFew requested and

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<sup>13</sup> See U.S. v. Rodriguez, in this summary, for these factors.

<sup>14</sup> Domestic Violence Order

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<sup>15</sup> 542 N.W.2d 514 (Iowa, 1996)

received a search warrant, detailing in the affidavit the information received from the CI, describing where the lab would be found and how it would be set up. There was some information indicating how the CI came to know this information.

When the warrant was executed, deputies found a variety of items related to methamphetamine manufacturing, including a 55-gallon drum of anhydrous ammonia.

At trial, the confidential informant was unavailable, because he was in a drug rehab program out of state. The parties were allowed to take his deposition by videotape, however.

Lovett was convicted, and appealed, arguing that the warrant was “constitutionally defective” because it did not detail the informant’s “reliability, veracity and basis of knowledge,” that the warrant information was “stale,” and that the magistrate was not “neutral and detached” because the warrant was faxed to the judge, who then returned only the signed back sheet.<sup>16</sup>

**ISSUE:** May a warrant be considered valid, when it does not specifically detail how the informant has the knowledge?

**HOLDING:** Yes

**DISCUSSION:** The Court found that the detailed information provided by the informant was more than “bare

bones” and lent “significant reliability to the information he provided.” In addition, the informant made statements that were “against his penal interest,” in other words, statements that implicated him in the commission of crimes as well, which lent credibility to the statement.

The court did not find the information to be stale. While the warrant does not indicate the time frame over which the CI had visited Lovett’s home, the last encounter occurred only a few days before the warrant was requested. In addition, the alleged crime was one that was an “ongoing, long-term activity,” which could be presumed to continue.

Finally, the Court did not have a problem with the method used to fax the warrant and affidavit to the judge, and the judge faxing back only the signed back sheet of the warrant, since presumably, the officer would in fact have the remainder of the pages in their original form. While Lovett implied the judge did not actually read the affidavit, the appellate court did not reach the same conclusion.

**Johnson v. Comm.**  
**105 S.W.3d 430 (Ky., 2003)**

**FACTS:** On July 18, 2000, deputies of the Ohio County Sheriff’s Department executed a search warrant at Johnson’s residence in Hartford. The deputies videotaped their actions at the scene.

When they arrived, Johnson was sitting on a stool in the living room. They served the warrant and

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<sup>16</sup> Several of these issues had not been preserved at trial, but the court chose to review them anyway.

escorted him outside so that he could confine an aggressive dog. Johnson was then handcuffed and searched. The deputies found a hypodermic needle on his person, along with a sheet of paper with the radio frequencies of the DEA, the Ohio County Police Department and other frequencies labeled “bugs.”

In the living room, deputies found marijuana roaches and a loaded .22 pistol. A holster for the weapon was found in another room. Various items connected with methamphetamine were found, a spoon with residue, “cutting” power, plastic bags missing their corners and surveillance cameras pointed outdoors.

Johnson was arrested for a variety of offenses, and was given the “firearms enhancement” because of the pistol. He did not contest that he was in possession both of the drugs and the weapon, but argued that the weapon was not in his “immediate control” when arrested because he was arrested outside, away from the gun and that the enhanced charge was inappropriate. However, Deputy Clark testified as the only reason Johnson was taken outside was because of the dog. The video demonstrated that the room was sufficiently small as to make the weapon readily available to Johnson.

Johnson also objected to the admission of the videotape, which showed him in an unflattering light – he was shirtless and “decidedly uncooperative.” At one point on the tape, he accused Officer Clark of

“planting” the needle, and the tape was offered into evidence to refute this claim. Johnson offered to stipulate that the needle had been in his pocket, but his offer was refused.

**ISSUE:** Is a video taken during an arrest admissible?

**HOLDING:** Yes

**DISCUSSION:** The Court found that the trial court did not abuse its discretion in admitting the tape, and that its probative value arguably outweighed any prejudice.

**Watkins v. Comm.**  
**105 S.W.3d 449 (Ky., 2003)**

**FACTS:** On May 20, 2000, Watkins was an inmate at the Hart County Jail, and worked in the kitchen. He left the jail and stole a pickup truck belonging to Deputy Jailer Trulock. Inside the truck, the deputy jailer had a handgun and cash.

Eventually, Watkins and the truck were located in Baltimore, Maryland. Hart County Deputy Sheriff Gardner and a second deputy were dispatched to go to Maryland and bring him back to Kentucky. While waiting for the plane, he allegedly told the deputies that he had stolen the truck, and if the battery had held out, he would have “made it to Canada.” Deputy Gardner testified to this statement in the preliminary hearing and before the grand jury.

On the day of trial, defense counsel received a copy of Gardner’s notes on the trip. They moved to suppress any statement recorded in the notes

for this reason. Watkins also objected to the introduction of the statement when he had not been giving Miranda warnings.

The trial court decided to limit the use of the notes, and restricted Gardner's testimony to the statements he made at the earlier proceedings. That Court found that Miranda warnings were not needed, since the statement was voluntary. At trial, Watkins testified that the deputies had told him anything he said would be "between them."

**ISSUE:** Are voluntary statements permissible?

**HOLDING:** Yes

**DISCUSSION:** The Court found that Watkins' statements were made voluntarily, and not as the result of any police action. The trial court's decision was based upon substantial evidence and Watkins' attempt to refute it at trial was insufficient.

**Clift v. Comm.**  
**105 S.W.3d 467 (Ky.App., 2003)**

**FACTS:** On January 31, 2000, the grandparents of Jack and Zack<sup>17</sup>, twin 11-month-old boys, picked up the boys (along with another grandchild) from their day care, owned and operated by Lashonda Clift. The grandfather noticed that Jack was fussy, his left arm was hanging down, and the child was gasping. The baby screamed when they attempted to put him into a snowsuit. When they got home and

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<sup>17</sup> The last name of the victims is not included in the opinion.

examined the child, they realized his arm was "seriously bothering him." They immediately took him to the hospital, where it was determined that the arm was fractured.

The family reported the crime to the Lexington-Fayette Crimes Against Children Unit, a specialty unit of the police department. Det. Gutierrez began an investigation.

Clift was indicted for Criminal Abuse in the Second Degree.

After several false starts,<sup>18</sup> the trial finally commenced.

At trial, Det. Gutierrez reported that Clift had admitted under interrogation that she had grabbed Jack and yanked him away from his brother, during nap time, to try to prevent him from awakening his brother. (However, at trial, Clift denied this admission, stating that she had picked him up gently, by both arms.)

Clift was convicted of Criminal Abuse in the Third Degree. Clift appealed, stating that the broken arm did not constitute a serious physical injury for an infant because it did not unduly impair the child's functioning.

**ISSUE:** May a broken arm be a "serious physical injury?"

**HOLDING:** Yes

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<sup>18</sup> First the trial was continued because the Court was informed that some of the detective's notes had not been provided to the defense under discovery. The second time the trial was postponed was as a result of the prosecution not disclosing that a tape of a telephone conversation between Jack's mother and Clift existed.

**DISCUSSION:** The Court discussed the standard for finding that an injury constitutes a “serious physical injury.” The Court examined cases from several jurisdictions, including several that held that a single broken bone that required some weeks to heal was a serious physical injury. The Court concluded that the injury sustained by the infant was sufficient to be considered a “serious physical injury.”

**Comm. v. McManus**  
**107 S.W.3d 175 (Ky., 2003)**

**FACTS:** On July 30, 1998, Deputy Hayden, McCracken County Sheriff’s Office, received a tip that McManus and Keister were cultivating marijuana at their home in Paducah. This tip came from Keister’s estranged wife, and through the Murray Police Department. The officers tracked down Keister’s current address from a civil summons previously served on him.

On August 6, deputies went to the home. They did not attempt to get a search warrant, as they did not believe they had sufficient information at that time to get one. They knocked on the door, McManus answered and stepped out on the porch to talk to them. They explained their purpose for being there, and asked for consent to search, which was refused. They told him they would likely be back, and if there was marijuana inside, he should dispose of it.

As the officers left, they noticed that the blinds were open on the picture window. They watched McManus

and another man running past the window, carrying items such as pots and grow lights. Deputy Hayden contacted the Chief Deputy, Terry Long, who instructed him to make a warrantless entry if he believed evidence was being destroyed. Long also spoke to the McCracken County Attorney, who gave the same advice. The deputies forced their way in and recovered marijuana plants and other items, and both men were arrested. Keister was not there at the time, but was soon arrested as well.

McManus and Keister moved to suppress the evidence based upon the Fourth Amendment, but the trial court denied the motion. Both men entered conditional pleas and were sentenced. The Court of Appeals agreed with the defendants that the evidence should have been suppressed and that there was no evidence of exigent circumstances introduced at trial, that the deputies created the situation. The Commonwealth appealed.

**ISSUE:** Must the prosecution actually present proof of exigent circumstances to justify warrantless entry?

**HOLDING:** Yes

**DISCUSSION:** The Supreme Court determined that the prosecution “failed to establish that the observed grow lights, pots and planting trays could be destroyed before a warrant could be obtained.” The Court found that the prosecution had not adequately proved the exigent circumstances claimed to “overcome

the presumption of unreasonableness that attaches to all warrantless home entries.”

**Rodriguez v. Comm.**  
**107 S.W.3d 215 (Ky., 2003)**

**FACTS:** On February 24, 2000, Rodriguez allegedly robbed a convenience store in Bullitt County.<sup>19</sup> Two clerks, Smith and Carter, were inside at the time. The robbery occurred at the very end of the day, shortly before the store was to close. The robber entered, pointed a gun at the clerks, threatened them with death and demanded money. They gave him the cash and he fled.

Smith called police, who arrived within minutes. She described the clothing of the robber in detail. Officer Cox arrived, ascertained that no one was hurt, and immediately set out to search for the suspect. Within thirty minutes, he spotted a man “walk out of a drainage ditch” and enter another convenience store, only a short distance from the first store. He called for backup, and Trooper Paul arrived. They approached the store, and Rodriguez ran from the store, jumped into a pickup truck that had been left running outside and drove out, almost striking Cox. It was not Rodriguez’s truck.

The officers chased Rodriguez into a dead-end alley. He fled from the truck into a wooded area. Minutes later he was apprehended by two

Jefferson County officers.<sup>20</sup> They returned Rodriguez to Paul and Paul identified Rodriguez as the man who had stolen the truck. They took him back to the first convenience store, where both clerks positively identified him. Eventually, they repeated these identifications at trial.

Rodriguez appealed, stating that the identifications by the clerks were the “unlawful result of an unduly suggestive, single person showup.” He also objected to the introduction of the theft of the truck and the “flight” in conjunction with the robbery case. The trial court had denied the suppression of the evidence.

**ISSUE:** Are single-person showups permitted?

**HOLDING:** Yes

**DISCUSSION:** While the Court agreed that “single-person-showup identification is inherently suggestive,” but found that the court must consider the “totality of the circumstances to consider the likelihood of an ‘irreparable misidentification’ by the witness.” The court referred to the five factors described in Neil v. Biggers,<sup>21</sup> to assist in making the assessment: the “opportunity of the witness to view the criminal at the time of the crime,” “the witness’s degree of attention,” “the accuracy of the witness’s prior description of the criminal,” “the level of certainty demonstrated by the witness” and “the length of time

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<sup>19</sup> Because part of the “case” occurred in Jefferson County, Rodriguez was actually tried in Jefferson County.

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<sup>20</sup> The pursuit apparently crossed the county line into Jefferson County.

<sup>21</sup> 409 U.S. 188 (1972).

between the crime and the confrontation.” The Court found that the evidence in this case supported the validity of the show-up

In addition, the court upheld the admission of the flight, because “flight is always some evidence of a sense of guilt.”<sup>22</sup> The court found that the flight was relevant evidence under the Kentucky Rules of Evidence, because the “theft of the truck was both temporally and spatially close to the crime charged.” The Court found some evidence to indicate that the truck was stolen to facilitate his escape from the environs of the robbery, not necessarily from a desire to steal the truck itself.

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<sup>22</sup> Quoting Hord v. Comm., 13 S.W.2d 244 (1929).

## NO CITATION AVAILABLE

**NOTE:** *This case is under a request for reconsideration and subject to change.*

**Kotila v. Comm.**

2002 WL 31887769

--- S.W.3d --- (Ky., 2002)

**FACTS:** Kotila was detained at a Wal-Mart parking lot in Somerset, on suspicion that he was shoplifting and under the influence of alcohol. A consent search of the vehicle in which he was riding yielded methamphetamine, possibly all of the chemicals needed to cook meth except anhydrous ammonia and muriatic acid, and possibly all of the equipment necessary to do such a cook.<sup>23</sup> Kotila was arrested, indicted and subsequently convicted of possession of the chemicals/equipment with intent to cook meth – a violation of KRS 218A.1432 (1)(b).

In relevant part, the statute states that the individual “possesses the chemicals or equipment for the manufacture of methamphetamine with intent to manufacture methamphetamine.”

Kotila appealed, arguing that the statute was unconstitutionally vague, and if it wasn’t, he needed either all of the chemicals or all of the equipment necessary to cook meth in order to be found guilty.

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<sup>23</sup> Because the trial court did not find it necessary to determine if all of the equipment and materials were present, the record does not reflect if that was indeed the case.

**ISSUE:** 1) Is the statute unconstitutionally vague?

2) Must the suspect have all of the chemicals or all of the equipment to be convicted?

**HOLDING:** 1) No  
2) Yes

**DISCUSSION:** The Court construed the use of the word “the” in the language of the statute to be all – inclusive. Therefore, the Court reasoned, the language must be read to mean that a defendant had to have in his possession either all of the chemicals or all of the equipment needed.

Since the equipment and chemicals needed for each of the different methods to cooking meth will vary, under this holding an officer will have to be able to identify the method being used in order to determine whether the suspect possessed all of the necessary elements.

In the Court’s opinion, the General Assembly has, in effect, raised a form of criminal attempt to be the actual substantive offense. Thus, criminal attempt would be applicable when a suspect had begun a cook without all of the necessary items, or when they were in the process of collecting the components.

In this case, it is possible that Kotila did possess all of the equipment, it was not clear from the record, and so the case was remanded to the trial court for reconsideration on that issue.

By interpreting the statute in this way, the Court found that the statute was not unconstitutionally vague.<sup>24</sup>

## UNREPORTED CASES

***NOTE: The following cases are unpublished. They shall never be cited or used as authority in any other case in any court of this state, pursuant to Kentucky Rules of Criminal Procedure 76.28 (4).***

### **Woolsey v. Comm.**

2003 WL 21832792 (Ky. App., 2003)

**FACTS:** On October 10, 2001, Officer Todd Siebert<sup>25</sup> received a dispatch that a person had purchased possible methamphetamine precursors at a local Wal-mart. Arriving there, he met a loss prevention officer, Bratcher, who gave him a description of the person and pointed out the vehicle, which was leaving the parking lot, and which bore Indiana plates.

Officer Siebert pulled over the vehicle and asked the driver for a license. The license came back as suspended. The driver, Woolsey was arrested and searched, and four lithium batteries<sup>26</sup> were found on his

person. Eventually, he was charged with several felonies.

Bratcher testified that he has watched Woolsey closely, because he purchased the lithium batteries. Bratcher had received training on methamphetamine and saw several things that made him suspicious. He did not “shop,” but instead immediately sought out the batteries and bought them, and then left the store. He wrapped the package tight and carried it in his palm. He also did not initially walk down the row where his vehicle was parked, but instead crossed over when he got to the vehicle. Woolsey also, according to Bratcher, appeared “secretive.”

Siebert testified that in his training and experience, there was a “noticeable correlation between Wal-Mart and the purchase of precursors.” He also noted that meth precursors are often bought from several stores, rather than just one, and that when Woolsey turned south, rather than north to Indiana, he was heading in the direction of a K-Mart and a Dollar General.

The trial court concluded that there was sufficient cause for Siebert’s traffic stop. The Court stated that “[t]he fact that Woolsey’s actions were just as consistent with innocent behavior as with criminal activity did not prevent Officer Siebert from arriving at a reasonable and articulable suspicion.”

Woolsey appealed, primarily on the basis of the initial traffic stop, stating that Siebert did not have sufficient cause to make the stop.

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<sup>24</sup> As a matter of practice, this opinion should be taken to change the usual way defendants are charged. Officers should become familiar with the various cooking methods used in their area. If all of the items are not present, officers might consider charging the suspects with Criminal Attempt.

<sup>25</sup> The opinion does not indicate Officer Siebert’s agency.

<sup>26</sup> A common item needed in methamphetamine processing.

**ISSUE:** Is the purchase of a single meth precursor sufficient to warrant a traffic stop?

**HOLDING:** No

**DISCUSSION:** The Court engaged in a short discussion of the standard for a Terry stop, and concluded that “this case aptly demonstrates the often elusive distinction between a mere hunch and reasonable suspicion.” The Court noted that “the relevant inquiry ... is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of non-criminal conduct.” The Court quoted Woolsey’s brief, which states that “[i]f spending \$10.00 to buy four lithium batteries raises such suspicion then every person who purchases drain cleaner or sale or sinus medication or any other legal, common product that could be used for nefarious means could be stopped and searched.”

The Court concluded that the trial court erred in not suppressing the evidence found as a result of the improper traffic stop.

**Haggard v. Comm.**  
**2003 WL 1948881 (Ky. App., 2003)**

**FACTS:** Officer Ryan responded to a noise complaint at a residence in Florence. Defendant Haggard’s brother, Justin, answered the door. When Justin opened the door, Officer Ryan smelled marijuana smoke inside. Justin denied that

anyone was smoking, but Ryan entered.

When Officer Riddle arrived, the two officers searched the residence and found marijuana roaches in the kitchen. Approaching Haggard, who had emerged from another room in the house, to perform a Terry frisk, Riddle noticed a white pill bottle in his pajama top pocket. He seized it and found it to contain Oxycontin.<sup>27</sup>

**ISSUE:** May a pill bottle in plain view be seized and examined?

**HOLDING:** Yes

**DISCUSSION:** The Court found that the officers’ actions were appropriate. The officers were legitimately at the residence investigating a complaint, and they immediately recognized the smell of marijuana, which justified the entry. The pill bottle was in plain view and as such, was able to be seized.

**Potter v. Comm.**  
**2003 WL 21039441 (Ky. App., 2003)**

**FACTS:** On February 10, 2000, Bowling Green Police Officer Brad Bowles responded to a “loud music complaint” at an apartment. When Bowles arrived, he did not hear music, but did hear several voices inside and smelled marijuana being burned. Bowles requested Officer Young respond as backup. Upon arriving, Young went to the back to determine if there was a back door,

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<sup>27</sup> Since Haggard was charged, apparently he did not have a prescription for this drug.

and to prevent anyone from fleeing the apartment.

Bowles knocked on the front door. He heard “commotion” inside, loud voices and “scurrying” toward the back. No one answered the door. He knocked again loudly, and announced that he was with the Bowling Green Police Department. Officer Young saw a rear window open and a “billow” of marijuana smoke. A female put her head out the window and he told her to “have someone answer the door.”

Hamilton answered the door, and Bowles entered the apartment. He believed there were “exigent circumstances involving the threat of loss or destruction of evidence” As he entered, he smelled both fresh marijuana and smoked marijuana in the room. He requested that all occupants come to the living room and sit down. Hamilton, the resident, was asked for permission to search his person, and he agreed.<sup>28</sup> Officer Young did a sweep search of the apartment and discovered a “trail of marijuana leading to the bathroom.”

As he was beginning to search Hamilton, Bowles saw Potter, sitting on the floor, “stuffing something behind a stereo speaker.” Young secured Hamilton while Bowles moved to Potter, and patted him down. He found a revolver in Potter’s back pocket and \$400 in cash on his person. He also found cash in the speaker. He handcuffed

Potter, but told him he was not under arrest, but was being handcuffed “for the officer’s safety.” Potter was asked about the location of the marijuana, and the officer told him they could call for a police drug if necessary. Potter responded that there was marijuana in the kitchen and gave consent to a search.

Officer Renfrow and Blitz, a drug dog, arrived. The dog found several gallon-sized freezer bags of marijuana in the cabinets, as well as scales and baggies. The dog also alerted on a large plastic container in the bedroom closet which contained trash bags filled with smaller bags of marijuana, as well as loose detergent.<sup>29</sup>

More marijuana and over \$8,000 in cash were found in other locations in the apartment. Young continued the search of Hamilton and found a small amount of marijuana and over \$3,000 on him. Young also found a key in his pocket that went to a rental car that Hamilton was driving. The large amount of marijuana found in the apartment gave the officers reason to think the car had been used to transport it, and they walked Blitz around the car. He alerted to the back passenger door and found marijuana residue and seeds inside, as well as in the trunk.

The next day, the officers requested and received a search warrant to re-enter the apartment and the car. The opinion does not indicate if anything further was collected.

Potter and Hamilton requested suppression of the evidence, but the

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<sup>28</sup> While the opinion never states specifically who was resident in the apartment, it implies that Potter and Hamilton were both able to give consent.

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<sup>29</sup> Used to mask the odor of the marijuana.

trial court found the entry into the apartment was justified under exigent circumstances. The Court also held there was probable cause to search the car. Both Potter and Hamilton were convicted. Both men appealed on a variety of issues.

**ISSUE:** May entry be based upon the odor of marijuana?

**HOLDING:** Yes

**DISCUSSION:** The men argued that there were no exigent circumstances, that the officers should have secured the apartment and sought a warrant. They further noted that “warrantless entries based upon the odor of narcotics have been prohibited.”<sup>30</sup>

The Court agreed that the police bore “a heavy burden when attempting to demonstrate an urgent need...”<sup>31</sup> to justify a search. And, the Court noted that the exigent circumstances exception “should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed.”<sup>32</sup>

However, the Court found that the trial court did not abuse its discretion in holding that the exigent entry and preliminary search was appropriate.

The men further argued that Potter’s consent was not voluntary, and “further tainted by Officer Bowles’s illegal entry.” Potter claimed that

he consented under duress because Bowles told him a dog would be brought and “would paw and scratch his belongings ....” The officers, however, testified that they did not threaten Potter, but only told him that the dog would be brought, and Potter indicated “he did not mind if the dog came into the apartment as long as it did not mess up his apartment or personal belongings.” The Court found that Potter’s consent was voluntary, and did not find Bowles promise to bring the dog a threat.

**Morgan v. Comm.**  
2003 WL 1193083 (Ky., 2003)

**FACTS:** On February 13, 2000, Muhlenberg County Sheriff Jerry Mayhugh arrived at a location near Morgan’s home, investigating a complaint. He parked in a nearby driveway to wait. Eventually, Morgan and a passenger drove by in a blue pickup. Believing, correctly, that Morgan’s license was suspended, Mayhugh pursued him. Because of the hilly terrain, Mayhugh was unable to keep constant visual contact with Morgan’s vehicle, although they remained close together. Mayhugh noticed debris on the side of the road, debris that had not been there a short time before. He also noticed a strong odor of ether, which he knew to be associated with methamphetamine production.

Mayhugh caught up with Morgan as he pulled into his own driveway. Fleming, the passenger, jumped out of the vehicle, with a red duffel and fled into the woods. Mayhugh pursued and caught him. Eventually,

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<sup>30</sup> Quoting Johnson v. U.S., 333 U.S. 10 (1948).

<sup>31</sup> Quoting U.S. v. Sangineto-Miranda, 859 F.2d 1501 (6<sup>th</sup> Cir. 1988)

<sup>32</sup> Id.

he was able to arrest Morgan, as well.

The bag was found to contain a number of items connected to the cooking of methamphetamine: a coffee pot, filters, glass jars, a plastic container that reeked of ether, drain cleaner, tubing and a breathing mask. The debris on the side of the road included a pitcher that also smelled of ether, lithium batteries and empty packaging, empty pill bottles for a nasal decongestant tablet and cold tablet packages. This debris was on both sides of the road.

A trial, Cheyenne Albro, of the Pennyrile Narcotics Task Force testified that the items were commonly used in the manufacture of methamphetamine. Another witness, who was at the Morgan house when Mayhugh arrived, stated he was there to buy methamphetamine, and other witnesses stated they had regularly bought and/or smoked meth with Morgan. The passenger in the truck, Tim Fleming, who was found in possession of the duffel bag, testified that he had been with Morgan cooking methamphetamine that day, and that he had thrown items from the passenger side of the truck during the pursuit, but had been “too busy” to notice if Morgan had been doing the same thing.

Morgan appealed, stating that it was impermissible to admit the testimony of witnesses concerning his actions prior to the arrest. He also objected to the admission of the results of a “swab” test, a field test that indicated

the presence of amphetamine or methamphetamine, taken from the pitcher discarded by the side of the road.

**ISSUE:** May statements made prior to the actual arrest be introduced, to prove a disposition to commit a crime?

**HOLDING:** Yes

**DISCUSSION:** The Court found that admission of the “prior bad acts” was appropriate under KRS 404(b), as it indicated Morgan had a predilection for using and manufacturing methamphetamine. The Court properly instructed the jury concerning the limitations of the testimony.

With regards to the swab test, Morgan stated that this method was not a “scientifically admissible manner of testing evidence.” However, the issue of scientific unreliability was not properly preserved by a specific objection during the trial, so the Court did not issue an opinion on that question.

**Comm. v. Sanchez**  
**2003 WL 21242025 (Ky.App. 2003)**

**FACTS:** Sanchez was arrested for an unspecified crime in Montgomery County. Police and the sheriff questioned him. At the subsequent suppression hearing, and after the court-appointed interpreter had reviewed the statement with Sanchez, he argued that the information learned during the initial custodial hearing was inaccurate and misleading.

During the hearing, the sheriff stated he believed Sanchez understood English because he was able to answer some questions asked in English; he had no other knowledge of Sanchez's English language abilities. The officers present noted that Sanchez did not "receive a translation of every question made," and that sometimes he did not wait for a translation and responded in English. The initial translator admitted that "she injected her own opinions into the translation and that she informed the officers that what Sanchez was saying did not always make sense to her."

The court-appointed translator "found that the volunteer custodial interpreter used by the police did not conform to the necessary standards." The prosecution argued that this was not relevant, because the Kentucky Supreme Court had not yet "imposed standards upon translation." The court-appointed translator noted numerous instances where the initial interpreter "either omitted information, added information, changed what was said or distorted the interrogation to some extent," and that "significant amounts" of information was left out of the translation. While the prosecution argued to the contrary, the court found that "Sanchez was clearly not provided with a reasonably competent interpreter" and suppressed the statement. The prosecution appealed.

On a side note, Sanchez claimed that his Vienna Convention rights were denied to him.

**ISSUE:** Is a foreign language speaker entitled to a competent translator?

**HOLDING:** Yes

**DISCUSSION:** The Court was not comfortable with whether Sanchez was made fully aware of his Miranda rights; the appellate court upheld the suppression. The transcript clearly indicated that "crucial portions of his Miranda rights were not fully explained."<sup>33</sup>

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<sup>33</sup>Quoting the opinion:

The English translation of the Miranda rights actually given to Sanchez shows its insufficiency clearly:  
You have the right uh, to remain in silence, uh  
Anything that you say can be (counted/told) against you and uh, against you also in the procedures.  
You have the right to consult an attorney, uh, before to make any conversation or any um, uhh ... court that's going to involve it uh, or to question eh, any question.  
You also have ummm ... right to have your lawyer whenever you want or to ask questions or when they are going to ask you questions.  
Uh, number four says, uh, you can ask the court to assign you an attorney and you have the right to uh, to have one.  
And number five says, um, you can stop asking questions in any (age in time/epoch) or um, refuse uh to respond to any type of question or uh, to ask for an appointment with your attorney before answering.

The custodial interpreter was asked by Sanchez to repeat # 2, and she stated, "all that you say can be used against you, and um, any other procedure in court." This version of a Miranda warning was insufficient to properly apprise Sanchez of his rights.

Because the suppression was upheld, it was unnecessary for the court to consider the Vienna Convention rights issue.

**Gray v. Comm.**  
**2003 WL 1786701 (Ky.App.2003)**

**FACTS:** On June 17, 2001, in the early morning hours, Louisville officers began to “sweep” the Park Hill housing project, a high-crime area. They observed Gray bicycling through the area, and apparently trying to avoid the uniformed officers on foot. Sgt. Gay stated that Gray “appeared startled” when Gay approached him, but did stop when asked, getting off the bike and dropping it. Gay stated that Gray “appeared ready to flee.”

Officer Dunn, approaching from another direction, asked Gray why he was running, and Dunn reported that Gray stated that there “might be outstanding warrants against him.” He was detained, and then taken into custody. Gay testified that near Gray’s bike, “he then observed part of a brown paper sack containing many individually-wrapped pieces of what he believed to be crack cocaine.” Gray denied the crack belonged to him, and Gay and Dunn “gave inconsistent testimony with respect to whether the paper sack had dislodged from under the bicycle seat or from inside its handlebars.”

Gray was indicted. He requested suppression, stating that the officers lacked an “articulable, reasonable suspicion” for the original stop and

was denied. He was convicted of trafficking and PFO.

**ISSUE:** 1) What sort of elements constitute “reasonable articulable suspicion for a Terry stop?

2) Must every piece of crack be tested before he can be admitted into evidence?

**HOLDING:** 1) See discussion  
2) No

**DISCUSSION:** The Court addressed many of the uncontradicted facts available to the officers: Gray was “bicycling (a common mode of transportation among drug couriers) through a high-crime area during the very early hours,” he “appeared to change his direction of travel several times in an effort to evade or avoid police officers” and “when he was stopped, his body motion suggested that he might flee.” The Court upheld the stop.

Next, Gray argued that the court “erred by admitting the individually packaged pieces of crack cocaine into evidence,” because only a minority of the pieces were actually randomly tested and confirmed to be crack, and because of this, he should not have been convicted of trafficking, rather than possession. The court held that since in this case, the total number of pieces was less relevant than the way it was packaged, the method of testing was appropriate. While the court noted that it may have been error to introduce the evidence, it was harmless error.

Next, Gray argued that Detective Halbleib, a Louisville officer, should not have been allowed to offer expert testimony concerning the habits of Louisville-area drug dealers. From the record, a Daubert<sup>34</sup> hearing was held, and evidence was presented that Halbleib had several years of experience and training related to narcotics, and was a certified police instructor in narcotics. Again the court found that to be appropriate.

Gray's conviction was upheld.

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<sup>34</sup> Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

# FEDERAL CASE LAW

## U.S. District Court

### Woods v. Jefferson County Fiscal Court 2003 WL 145213 (W.D., Ky., 2003)

**FACTS:** On March 23, 2000, Jefferson County police officers were engaged in a surveillance of a drug trafficking location. Officers Parks and Waters, along with Sgt. Schmidt, were conducting the surveillance.

The officers elected to follow a vehicle that left the location they were watching, and Schmidt followed the vehicle into a gas station. Parks was also following, but he went past the station and had to turn back.

Schmidt testified that he approached the vehicle, seeing three people inside. Woods was in the backseat. Schmidt stated that he saw a bag of marijuana in Woods' lap; Schmidt opened the door, grabbed the marijuana and tossed it on top the car. Woods lunged forward in the car, and Schmidt grabbed him, pulling him from the car while Woods was kicking and struggling. Schmidt took Woods to the ground twice during the fight. Finally, Schmidt saw Officers Herman and Waters arriving, along with Parks.

As Parks and Herman were taking Woods to the back of the car to search him, Woods ran away from them and fell into the gas pumps. Herman and Waters grabbed him and they all fell to the ground, with

Woods continuing to fight. Schmidt saw Herman standing over Woods with his foot on his lower back/buttocks to hold him down. Parks later testified that he used a second set of cuffs to secure Woods' ankles because he was flailing and kicking. Herman testified that he had tackled both Parks and Woods, because Woods was dragging Parks. During that encounter, he stated, Woods observed a cut over Woods' eye. He admitted that he held Woods on the ground by kneeling on his back.<sup>35</sup>

The testimony of all of the officers involved was consistent, but was contradicted by Woods. In his deposition for this civil lawsuit, he acknowledged that he was in possession of illegal drugs. Woods stated that he did not struggle when pulled from the car, and that he received facial injuries when first pulled from the car. He also claimed that Herman beat and kicked him. He stated that same officer (Herman) handcuffed him and picked him up by the arms, and that he stumbled forward slightly, claiming that he lost consciousness and remembered nothing more until he was in the jail. (During that time, apparently, he was treated and released from a hospital ER for his injuries.)

Eventually, Woods pled guilty to drug charges, assault in the third degree, resisting arrest and escape in the third degree. He sued, alleging excessive force and a variety of related state claims. Both parties requested summary judgment.

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<sup>35</sup> No injuries were alleged from this action.

**ISSUE:** May summary judgment be given when there is a discrepancy in testimony, when the plaintiff's version of the facts could result in liability?

**HOLDING:** No

**DISCUSSION:** The Court divided the incident into two separate elements, Woods' removal from the car and the alleged attempted escape near the pumps. Taking the last event first, the Court found that Herman's actions were appropriate under the circumstances as described. The Court stated that "[p]erhaps Herman misjudged the situation, but the tackling was not excessive even if miscalculated." In fact, the evidence was that the force was applied equally to both Woods and Parks. Woods stated he had no memory of the events, although he tried to introduce the unsigned statements of several witnesses to what he claimed occurred, the Court refused to consider those statements.

As to the first event, Woods' extraction from the car by the officers, Woods' description by deposition is sparse, but he identified Herman as the perpetrator of all of the injurious actions. The officers admitted that they pulled him from the car, because he did not immediately comply. While a jury may find that the officer's actions were reasonable, and find Woods' allegations incredible, the court found an "inescapable difference of testimony" and "a jury could decide that such actions were unreasonable force." However, the Court found it

was not its "prerogative at this stage to judge the credibility of witnesses," and that it could not "simply disregard Woods' testimony as unbelievable."

The court allowed certain of Wood's claims to continue against Herman and the other officers, in particular his federal claim of excessive force and his related state claim of assault and battery, but ruled against him with regards to his claims of malicious prosecution, false imprisonment, defamation, outrage and intentional infliction of emotional distress. The Court dismissed the Fiscal Court as a defendant as well.

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## U.S. Court of Appeals Sixth Circuit

**U.S. v. Al-Zubaidy**  
**283 F.3d 804 (6<sup>th</sup> Cir. Mich. 2002)**

**FACTS:** Al-Zubaidy and his wife, Aathra Al-Shimary, were married in Saudi Arabia in 1992. Subsequently, they moved to Rockford, Illinois, along with their two children. The marriage was both emotionally and physically abusive. They moved several times, to Missouri and to Nebraska, where the abuse continued. In Nebraska, Al-Zubaidy was charged with sexual assault. Al-Shimary obtained a Nebraska divorce in 1997, and moved back to Illinois. Al-Zubaidy followed her and began to threaten her if she did not resume the marriage. Finally, she elected to move to Detroit, Michigan, to be near her family.

Shortly afterward, Al-Zubaidy also moved to Detroit, and began to make threatening calls to Al-Shimary's father, making death threats against them all. The calls continued daily for a period of months, and at one time, it is alleged, he burned the father's car and broke a window at his home. At one point, the father stated that Al-Zubaidy made a physical threat towards him, by making a slashing motion across his throat.

Eventually, he learned of his ex-wife's address, and he began direct harassment against her. He allegedly assaulted her with a baseball bat outside her apartment. Another time, he assaulted her with a heavy toy, and later tried to force her into a car. In March, 1998, Al-Shimary's apartment was burned, and Al-Zubaidy indirectly claimed credit for it. He would also stand outside and make loud threats.

Eventually, Al-Zubaidy was arrested and charged with interstate stalking. He was sentenced to 46 months, and appealed.

**ISSUE:** Is it necessary to prove that a suspect crossed a state line with the specific intent to stalk or harass another individual?

**HOLDING:** No

**DISCUSSION:** Al-Zubaidy argued on appeal that there was insufficient proof that he crossed state lines with the intent to harass his ex-wife. The court found that charge to have three separate elements: that interstate travel occurred, that the intent of the

subject was to injure or harass another and that the person the subject intended to harass was in fact "placed in reasonable fear of death or serious bodily injury" to herself<sup>36</sup> or another. Al-Zubaidy stipulated that he did travel from Illinois to Michigan. However, he stated that his intent was not to harass his ex-wife, but to be near his children, and pointed to the delay between his arrival and his harassment of his ex-wife, conveniently forgetting that his harassment of her family began almost immediately.

**Calvert v. Wilson**  
**288 F.3d 823 (6<sup>th</sup> Cir. Ohio, 2002)**

**FACTS:** In February, 1996, a Guernsey County, Ohio, grand jury indicted Vincent Calvert and Erwin Mallory with aggravated robbery and murder. They were tried separately, with Calvert's trial occurring first.

At the trial, a statement given to officers by Calvert was introduced. The statement said that Calvert had spent the afternoon of the murder playing cards and drinking with Robert Bennett, in Bennett's home. When he left in the late afternoon, he went to Paul Bates' apartment to borrow money, then to Cindy Chalfant's apartment, next door to Bennett's. Some time later, Mallory knocked on Chalfant's door and asked Calvert to accompany him next door to Bennett's apartment, claiming that Mallory had "ripped him off" the previous night for \$100, and Calvert did so.

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<sup>36</sup> While the court uses the term "herself," this statute is gender-neutral.

When Bennett answered the door, he began yelling at Mallory, using racial epithets, and telling him to leave.<sup>37</sup> All three were intoxicated. Calvert reported that within seconds, Mallory had pulled out a hatchet and started hitting Bennett in the head. Mallory then stopped, and helped Bennett to a chair. However, he began assaulting Bennett again, with a stick, when Bennett asked Calvert to help him get Mallory out of the house. When the stick broke, Mallory picked up a butcher knife and slashed Bennett across the throat. Calvert claimed he was sitting at the table across from Bennett when this occurred, and that he told Mallory he was crazy and fled.

Calvert claimed to have taken a cab to a bar, staying there until closing, and then getting a ride home. The next morning, he took a cab to Chalfant's apartment, still wearing the blood-splattered clothes, where the police found him. He claimed he knew nothing of Mallory's alleged plan to kill Bennett.

At Calvert's trial, Mallory was called by the prosecution, but refused to testify. The court admitted, over defense objections, a tape-recorded confession by Mallory that described the events differently. Mallory admitted arguing with Bennett over money Mallory claimed to have won in a card game. A neighbor intervened, telling Mallory to "put down the ax" that he was using to threaten Bennett. The next evening, Bennett invited Mallory and Calvert

to play cards the next evening. After a few minutes of play, Mallory and Calvert went to Mallory's apartment nearby and armed themselves with knives and a hammer to kill Bennett. When they returned, they beat and stabbed Bennett, and eventually Calvert slashed Bennett's throat. Calvert went to Chalfant's apartment, and Mallory went home to change, and while there he disposed of the weapons, throwing the hammer out the window and dropping the knives in the storm sewer. A knife found by officers inside Mallory's building was not used in the attack, Mallory claimed.

Calvert and Mallory took a cab to the bar, and Mallory left a short time later to go home, where he was arrested the next day. Another witness, Bennett's grandson, testified that earlier on the day of the murder, Bennett had been upset about having lost some money, and that Mallory had threatened him. A doctor testified that Bennett died from multiple stab wounds.

Calvert was convicted. He appealed the admission of Mallory's statement, as he had not had an opportunity to confront him on the witness stand. The state appellate court found that Mallory's statement was properly admitted as a "statement against the declarant's interest" pursuant to the rules of evidence.<sup>38</sup>

**ISSUE:** May a co-defendant's statement detailing conduct be admitted, without requiring the defendant to actually testify?

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<sup>37</sup> Bennett was white, Calvert and Mallory are African-American.

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<sup>38</sup> Kentucky has a similar provision, KRE 804.

**HOLDING:** No

**DISCUSSION:** Calvert petitioned the federal District Court for a writ of habeas corpus, using as his grounds the Confrontation Clause. The Court examined the legality of admitting Mallory's statement, and found, following court precedent, that "a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor ...." Such statements may only be admitted when the discrepancies between the stories are minimal.

The Court found clear federal precedent that required the tape-recorded statement be excluded. The Court further found that the admission of the statement was not "harmless error," but in fact, that the statement was "the most compelling piece of evidence" against Calvert, particularly with respect to the evidence indicating that the murder was planned. As such, the court ordered a conditional writ of habeas corpus, requiring that Calvert either be retried (with the statement excluded) within a reasonable period of time, or released.

**Fridley v. Horrichs**  
**291 F.3d 867 (6<sup>th</sup> Cir. Ohio, 2002)**

**FACTS:** Fridley, an Ohio resident, collected vintage Corvettes. He placed an ad in a national publication offering to sell two Corvettes. Gluzsek, an Illinois state law enforcement officer, contacted

Fridley, and learned he also sold Corvette parts; he also learned that several of the parts had detached VIN tags. Fridley claimed that the tags had either fallen off, did not exist when he purchased the parts, or that he had detached them for unknown reasons. Gluzsek attempted to arrange a purchase of parts and VIN tags. Fridley was originally reluctant to travel to Illinois, but was eventually convinced to do so by a promise of expense money, and they met in Springfield to complete the sale.

That morning, Officers Horrichs and Brown accompanied Gluzsek. (Other defendant officers had varying degrees of involvement in the matter, as well.) For each part, Fridley had the tags in separate envelopes, and had valid certificates of title for the parts; there was no dispute that he was the lawful owner of the parts.

Fridley was arrested for a violation of Illinois law, prohibiting ownership of VIN tags that have been removed.

Prior to that morning, the officers had made no attempt to monitor Gluzsek's efforts, nor had they investigated Fridley in any way. In fact, Gluzsek had been arrested for his role in an auto theft ring, and hoped that his efforts would gain him leniency. His original contact with Fridley had been of his own volition.

Eventually, the prosecution moved to dismiss the charges, and some time later, Fridley regained most of his property. The VIN tags, however, were only released when Fridley

sought a court order for their return. He then filed a civil rights lawsuit under 42 U.S.C. §1983.

The magistrate judge recommended that the District Court dismiss the lawsuit against all defendants, applying relevant Seventh Circuit case law. However, the District Court chose to dismiss, basing its conclusion instead on Sixth Circuit case law, holding that the officers did not have knowledge of exculpatory facts and thus had probable cause to make the arrest. Fridley argued, however, that the officers “knew or should have known” that he had been entrapped, and that he had an affirmative defense to the charge. The Court stated that to succeed, Fridley must show that the officers knew that Fridley was induced by the actions of the agent (Gluzsek) and that he lacked the predisposition to commit the crime.

While the Court found that the facts strongly suggested that the officers knew Fridley was induced, because they provided the money that had been forwarded to Fridley for travel expenses, and they knew that numerous phone calls had been made, they found no evidence that the officers had reason to believe Fridley was predisposed to commit an act that was illegal in Illinois. (Apparently, it was legal to sell the parts in Ohio.) The Court found that it was not the rule that officers “must investigate a defendant’s legal defenses prior to making an arrest.” While the Court found that “[h]ad the defendants not blindly relied on their informant, they may have called off the investigation after determining

that the possibility of a successful prosecution was slim,” they could not find that the defendants “conclusively knew” that Fridley lacked the requisite predisposition to commit the crime.

**ISSUE:** Must officers explore the possibility of affirmative defenses available to defendants?

**HOLDING:** No.

**DISCUSSION:** The Court explored previous cases in Ohio that stated “a peace officer, in assessing probable cause to effect an arrest, may not ignore information known to him which proves that the suspect is protected by an affirmative legal justification.” The Court found that the plain language of the rule, however, made it clear “that a police officer is not required to inquire into facts and circumstances in an effort to discover if the suspect has an affirmative defense.” In other words, an officer is not permitted to ignore information that becomes available in the course of an investigation, but is not required to actively seek out the information, either. The Court upheld Fridley’s conviction.

**NOTE:** *While the actions took place in Illinois, in the Seventh Circuit, Fridley brought his lawsuit in Ohio, his state of residence, in the Sixth Circuit.*

**U.S. v. Hopkins**  
**295 F.3d 549 (6<sup>th</sup> Cir., Tenn. 2002)**

**FACTS:** On the day of his arrest for drug trafficking, November 13,

1998, Hopkins made statements to Officer Matthew Pugh (Memphis Police Department) relating to the “quantity of drugs he [Hopkins] had distributed.” He had been properly advised of his Miranda rights and had waived them. No affirmative representations were made by Pugh (or any other officer) that such statements would not be used against him.

The District Court then used those statements in evaluating Hopkins conduct for sentencing purposes. Hopkins appealed, contending that he only made the statement because “Officer Pugh assured him that his cooperation could only help, not hurt him,” and that that assurance “implied that no self-incriminating information provided would be used against him.” Hopkins argued that was an agreement that must be recognized by the court, and that the information could not be used to his detriment.<sup>39</sup> The District Court however, disagreed, and found in favor of the prosecution.

**ISSUE:** May a suspect’s statements be used against the suspect in sentencing, even if a promise is made that cooperation will be helpful in the suspect’s case?

**HOLDING:** Yes

**DISCUSSION:** The Court found that the use of the statements against Hopkins in his sentencing did not violate the “government’s promise that Hopkins’ cooperation would be

help to him.” In fact, the court found that the “promise was fulfilled, as Hopkins’s cooperation resulted not only in credit for acceptance of responsibility, but also in a significant downward departure for substantial assistance ....”

**U.S. v. Burns**  
**298 F.3d 523 (6<sup>th</sup> Cir. Ky., 2002)**

***NOTE: As this case involved a large and complex drug trafficking conspiracy, only the facts related to issues that will be addressed in this summary will be presented.***

**FACTS:** During the summer of 1998, several individuals met regularly to weigh and package crack cocaine at a Covington apartment controlled by Baker. Usually Anthony and Jerome Harden, and Michael Jordon would process the crack, while Burns watched. However, this practice did vary on occasion. When the drugs were packaged, Burns would send Jerome Harden or Jordon out to bring buyers to the apartment. Other individuals also sold crack under Burns’ direction.

Carol Baldwin first met Burns when he delivered crack to her boyfriend, Chris Porter. Later, she met Burns, and others involved in the conspiracy at various times. In March of 1998, Baldwin was arrested for distributing crack purchased by Porter, and Burns posted her bond. In that same month, Porter was also arrested for selling crack to an undercover officer, crack that he claimed he received from Burns. Other individuals were also arrested during

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<sup>39</sup> The law regarding this issue is found in United States Sentencing Guidelines(U.S.S.G) §1B1.8(a).

this same time period, and all claimed that the crack they sold came from Burns.

During the course of this investigation, on March 20, 1998, Newport officers stopped Burns, after Baldwin informed the officers that Burns did not have a valid operator's license. Burns produced a false Ohio driver's license, and was arrested. He was handcuffed and given his Miranda rights. The officers searched his car – finding two paychecks belonging to Jerome Harden, a sheet of paper with names paired with dollar amounts, and \$1,780.00 in cash, which was on Burns' person. Burns invited them to search his hotel room, which he shared with Jordon. The officers took him up on the invitation and searched, using Burns' key, and found Jerome Harden there, along with two plastic bags with cocaine residue. Both were charged with various drug offenses.

A few months later, on July 2, two Covington officers responded to a juvenile with a gun in a drug-trafficking area. At the location, the officer saw a person fitting the description (apparently Jordon) in the company of Burns, Jerome Harden and Paul Green, who then got into a vehicle "registered to Burns under a fictitious name and identified ... as a vehicle previously associated with drug activity." They stopped the car. Harden was driving; he did not have an operator's license. Harden was arrested. The officers initially searched for weapons, but found instead that Green was concealing a bag

containing crack. They searched the entire car and the occupants, finding \$5,080 in the glovebox, a handgun and ammunition in the trunk, and \$402 and a pager on Harden.

Burns, the Hardens and Jordon were all convicted of a variety of charges relating to drug trafficking, continuing criminal enterprise and conspiracy. They appealed on a multitude of issues.

**ISSUE:** 1) May a traffic stop be made based upon information about a driver's license status?

2) Does having handcuffs on a suspect negate consent?

3) May a traffic stop be made on a weapons-related allegation, and a frisk of the vehicle be made as well?

**HOLDING:** 1) Yes  
2) No  
3) Yes

**DISCUSSION:** With regard to the traffic stop of Burns on March 20, the Court found that the officers had sufficient probable cause to stop the vehicle, because Baldwin had given them information as to his driving status. The Court chose to address the issue of the validity of the search of Burns' car, subsequent to Harden's arrest, as a consent issue, and found that the officers' collective recollections of the arrest were more credible than Burns' claim that he had not given consent. They found the consent to have been given by someone with authority, and that the evidence indicated it had been given

voluntarily. Part of the conversation regarding the consent to search the motel room was taped, and it supported this conclusion. The Court stated that even though Burns was handcuffed at the time, because he was under arrest, his “consent was not invalidated simply because he was in custody at the time that he gave it.” He was not otherwise confined or threatened.

Turning to the July 2 traffic stop of Harden, however, the Court agreed that it was not based upon probable cause to believe a traffic violation had occurred. The Court found instead that this was a reasonable suspicion stop to investigate a non-traffic-related offense, the allegation that a juvenile was brandishing a weapon, and found that the circumstances did warrant the stop. The allegation of the weapon was sufficient to permit the officers to “frisk” the car for weapons. Once the bag containing cocaine was spotted in plain view (although apparently Green was trying to conceal it), the officers were justified in seizing it, and using its presence to do a further Carroll search of the vehicle. That Carroll search allowed the officers to search the trunk, where the weapon was found. Finally, the Court denied Jerome Harden’s motion to suppress evidence found in the motel room, holding that Burns had “common authority or control” over the room and could give consent.<sup>40</sup>

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<sup>40</sup> In fact, only Burns was registered as an occupant in the room.

**U.S. v. Orsolini**  
**300 F.3d 724 (6<sup>th</sup> Cir. Tenn., 2002)**

**FACTS:** On June 30, 2000, Orsolini and a female passenger were stopped by THP<sup>41</sup> Officer Pierce for speeding. According to Pierce’s radar, Orsolini was traveling in excess of 80 mph; the speed limit on that stretch of I-40 was 65 mph. Pierce asked Orsolini for his license and registration, and received a photocopy of an interim California license and an El Paso, Texas bill of sale for the vehicle. The license and bill of sale were for a Nicholas/Nicolas Panatelli. The vehicle had a temporary license plate.

Pierce asked the occupants about their destination. Orsolini said they were going from California to Boston to visit family. There were food wrappings on the floorboard and a large pile of clothing and luggage in the back seat. Pierce inferred that they had not been stopping to eat or change clothing. With this observation, and the knowledge that El Paso, Texas was a common entry point for drugs, Pierce believed they were involved in drug trafficking.

Pierce returned to his car to write the citation, and also called for assistance from Officer Brinkley, a fellow THP officer. Brinkley arrived in approximately ten minutes. After speaking to Pierce, Brinkley proceeded to also question the pair. He was told they were traveling from Texas to Boston to visit high school friends, and that Orsolini had flown from California to Arlington, Texas to

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<sup>41</sup> Tennessee Highway Patrol

visit a friend of his grandmother. He claimed his grandmother lived in Arlington and her friend in El Paso, where he purchased the car. He further claimed that the vehicle was new when he bought it, and that he was unemployed. His passenger separately related that they were going to Boston to visit Orsolini's family.

Pierce issued the citation and told Orsolini he was free to leave. Brinkley then asked if Orsolini had anything illegal in the car, and if he would permit a search. Orsolini became visibly nervous: his left eye was twitching, his breathing increased and the artery in his neck bulged. However, he did consent to the search. Pierce asked him to stand at the side of the road and take his hands from his pockets, whereupon Orsolini withdrew his consent. The officers told the pair they could leave, but that the car would be held for a drug dog.

At 3:27 p.m., Pierce called for a canine unit. Orsolini and his passenger stated they wanted to go to the next exit to use the restroom and get a drink. The passenger wanted to walk, but Brinkley told her pedestrians were not allowed on the highway. THP Officer Ferguson was called, and transported them to the requested location. He watched as they walked away from the store.

A few minutes later, THP Officer Williams arrived with his dog. The dog alerted on the trunk. At that time, Ferguson was instructed to bring the two back to the car, which he did. At the scene, the pair was

arrested, as marijuana had been found in the trunk.

Orsolini was charged with marijuana distribution and conspiracy. He requested and received suppression of the evidence seized at the traffic stop.

**ISSUE:** Must points of suspicion to justify a traffic stop be considered in their totality?

**HOLDING:** Yes

**DISCUSSION:** In looking at the reasonableness of the traffic stop and detention, the trial court listed six suspicious points: the recent purchase of the vehicle in a "source city," inconsistent stories about the Texas visit, inconsistent stories about the visit to Boston, inconsistent stories about the relationship between Orsolini and the passenger, Orsolini's nervousness and Orsolini's revocation of consent. The prosecution argued that these factors must be judged in their totality, rather than individually. The appellate court agreed that the trial court erred, and pointed to several additional relevant factors: Orsolini's photocopied driver's license, luggage and clothing and food wrappers inside the car, and Pierce's inferences about these factors.

The Court admitted that this was a "close case" but found that the trial court erred in not considering the totality of the circumstances and that had the court done so, the outcome may have been different.

The District Court had also

concluded that the pair were “detained for an unreasonable amount of time without probable cause,” in particular because the officers refused to allow them to walk along the highway to the next exit, but the prosecution argued otherwise, noting that they were offered, and accepted a ride, in the alternative. The appellate court noted that the original traffic stop began at 3:11 p.m., and that the drug dog had alerted by 4:02, less than an hour later. The officers waited 35 minutes just for the handler and dog to arrive, because the canine officer was off-duty. By 3:27, the pair was told they were free to leave, and at 3:47, they were given a ride to the exit, and noted, in particular, that the transport officer made no attempt to prevent them from walking away from the store until the dog’s alert had been reported to him. The Court found that the stop did not take an unreasonable amount of time.

**U.S. v. Haynes**  
**301 F.3d 669 (6<sup>th</sup> Cir. Tenn. 2002)**

**FACTS:** On October 23, 1998, Haynes was arrested by the Union City, Tennessee police. He was at the home of Janice Justis<sup>42</sup> at the time. Sgt. George stated that, in late September, he had received information from Illinois that Haynes was wanted there for burglary and parole violations. Haynes was alleged to have stolen several firearms and a large quantity of jewelry. Sgt. George was further told

that Haynes was known to be armed, was dangerous and had told his attorney “he would not be taken alive.”

Having information as to Haynes’ location, which was in a Housing Authority complex, George contacted the manager, and was told a male fitting Haynes’ description was at the apartment. George was given information as to Haynes’ vehicle. George sent Lt. Kelly and Capt. Vastbinder to check the apartment, along with Officers Carr and Lemons, and proceeded to the apartment himself. When he arrived, he heard Kelly’s voice from inside, and upon entering, George found Kelly, Vastbinder and a woman, believed at the time to be Justis<sup>43</sup>.

George was in a bedroom when Haynes was discovered by the officers to be hiding between a mattress and box spring. George recalled that Haynes was handcuffed at that time, and that he believed he had been patted down. He denied knowing if car keys were taken from Haynes at that time, and denied having made that claim to defense counsel. George stated that he and the other two officers stayed in the bedroom until Haynes was removed, and that George stayed in the bedroom when the other officers left with Haynes.

Some minutes later, George was told by the Chief that Haynes had given consent to search the vehicle. He denied any officer entered the car before the consent was given. Carr

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<sup>42</sup> During the pendency of the action, Justis and Haynes married. For the purposes of this summary, and to reduce confusion, she will be referred to as Justis throughout.

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<sup>43</sup> Later it was determined that this woman was in fact a neighbor, Tammy Clark.

stated however, that the patdown did not occur until Haynes was taken outside, and at that time, he removed the keys from Haynes' pocket.

Carr also stated that Haynes told him the car, a Firebird, was registered to his daughter, but that he had purchased it. Haynes was concerned about his daughter, but according to Carr, agreed to the search. Carr used the key to unlock the car. Lemons' testimony essentially mirrors Carr's except that he didn't know if the car had in fact been locked. Lemons stated that he and Carr found a .357 Magnum under the floorboard<sup>44</sup> and some KFC food packages. After searching the vehicle, he and Carr also examined Haynes' mouth.

The testimony of five witnesses, including Haynes and Justis contradicts the officers' statements. Vibbert, who claimed to only know of Haynes, stated that she was outside the apartment during the incident. She claimed that a single officer left the apartment and opened the car door, and only after that, did she see Haynes escorted out. By that time, the officer had shut the car door. The search was then resumed. She did not see anything removed from the Firebird. She identified the officer as being George, and that he was in uniform. However, all police officers present claim that George was not in uniform that day.

Brandon, another witness, did not know Haynes; she was visiting a friend next door to Justis's apartment. She also stated that five

or ten minutes after the officers' arrival, a single officer, in uniform, left the apartment, opened the car door and briefly looked inside. She then saw Haynes being brought out, but did not remember a patdown; but she did remember seeing the officers later remove him and search his mouth.

Brandon's friend, Tasha King, also testified. She also did not know Haynes. Her account of the single officer searching the car, the lack of a patdown, and of the search of the mouth, matched that of the other witnesses. Haynes was the final witness. He stated that his keys were removed from him inside the bedroom. He also stated that Lemons was the officer who went outside and searched his vehicle. He refused to sign a consent form to search the vehicle.

The Court noted that Justis signed a consent form for the apartment search, so forms were available at the scene. The Chief stated that the agency's policy did not require a form to be signed for a vehicle search, although it was required for a residential search. Under questioning, George admitted that he would have usually been able to get a warrant in less than thirty minutes. Eventually, upon arrival at the police department, Haynes did sign a waiver of his Miranda rights and gave a recorded statement to George. In the statement, he admitted ownership of the gun and the jewelry found in the car, as well as the marijuana found there. His daughter had pawned some of the stolen jewelry, but he stated she did

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<sup>44</sup> Presumably the court means the floor mat.

not suspect that the jewelry had been stolen. During the suppression hearing, however, Haynes claimed that George threatened both his daughter and Justis with prosecution, and specifically, that his daughter would be arrested because she owned the car.

One issue brought up in the suppression hearing concerned the original entry by the officers into Justis' apartment. Lt. Kelly stated that when they arrived, they asked the woman who answered the door if Haynes was present, and she pointed to the bedroom where Haynes was found. Kelly admitted that he had his gun drawn at the time, but that he did not enter until they had identified themselves. Clark, the woman at the door, testified that she backed up because "there were two guns pointed in her face," and that the officers forced her back. However, the Court felt that Kelly's possible lie was not relevant to the case – but that George's testimony concerning the issue was more important. In his statement, written later, George indicated that Justis had opened the door, but by that time, he should have been aware that it was not Justis. Lemons' credibility was also in doubt, since he made statements in contradiction about his identification of Justis at two different points in the investigation.

Eventually, Haynes lost the suppression hearing, since the Court found that Haynes later consented to the bad search done earlier. However, the Court stated that

"finding the truth in this one is sort of like trying to catch moonbeams in a jar because there are so many different accounts of what happened." The Court also found that even had Haynes not consented, there was sufficient cause to search the car under Carroll v. U.S.<sup>45</sup>

**ISSUE:** 1) May officers search a vehicle under Carroll, without exigent circumstances, with less than probable cause than the vehicle contains contraband?

2) Is a consent valid when the suspect believes that the area has already been searched?

3) Is a statement coerced when it comes as a result of "threats" against another potential defendant?

**HOLDING:** 1) No  
2) No  
3) No

**DISCUSSION:** First, the Court addressed the issue of whether the officers had sufficient exigent circumstances to search the Firebird, and found they did not. The Court agreed that the officers did not need a warrant to search the vehicle, because it was a vehicle, however, the appellate court did not find that the officers had information "that would lead to any more than a mere suspicion that Haynes stored [the stolen items] in his car." As such, the situation did not justify a Carroll search.

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<sup>45</sup> 267 U.S. 132 (1925).

Next the Court addressed the issue of Haynes' consent to search the car. Given the problems with the statements given by Carr and Lemons, the appellate court found that the lower court gave too much credence to the officers, and not enough to Haynes and the other witnesses, all of who gave consistent stories about the search. The Court found that valid consent was not obtained before or during the search. The Court also held that Haynes possible later consent, after he had reason to protect his daughter, did not remove the taint of the first search, as there was no "significant intervening time, space, or event." The Court noted that Haynes was aware of the previous search and may have "reasonably believed that the horse was already out of the barn." As such, the Court found that there was not sufficient proof that the consent was valid.

Finally, with regard to Haynes's statement to George at the station. The Court found that Haynes' age, and knowledge of the criminal justice system, coupled with the fact that he had received Miranda, and the fact that the "threats" to investigate Justis and his daughter were "not of such a gravity" so as to present such coercion, led the Court to believe that the statement was no coerced, and the Court affirmed the lower court's denial of the motion to suppress the statement.

**U.S. v. Miggins**  
**302 F.3d 384 (6<sup>th</sup> Cir. Tenn., 2002)**

**FACTS:** This case arose from the controlled delivery of a package sent

via Federal Express, from Los Angeles to Nashville, and which contained slightly over one kilo of cocaine. The department had been informed of the package by the LAPD, and a drug dog in Nashville alerted on the package.

A Nashville officer, posing as the FedEx driver, delivered the package to Moore's residence. Miggins, along with McDaniels and Watson, met him and Miggins signed for the package, under an assumed name.

This delivery triggered an anticipatory search warrant for Moore's home; a firearm was seized during the search. Moore, a convicted felon, eventually claimed the weapon as his.<sup>46</sup> The Nashville police also arrested Miggins, McDaniels and Watson after they left with the package, and later searched the residence of Miggins and McDaniels, finding firearms,<sup>47</sup> drug paraphernalia and packaging materials and more cocaine.

A variety of criminal charges ensued, including allegations of drug trafficking, conspiracy and firearms violations for each of the four men. Moore was tried separately from the other three.

Moore requested suppression of the firearm found during the execution of the anticipatory search warrant. Officer Adams testified that the search warrant was to be triggered

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<sup>46</sup> At one point, Moore claimed the weapon belonged to his brother.

<sup>47</sup> A rifle and a revolver were found in McDaniels' bedroom and a pistol was found on a chair in the living room.

by the package being taken inside the house. All three men were seen to enter and leave the house prior to the delivery of the package. However, the three men who accepted the package never returned to the house, but instead got into a vehicle and left.<sup>48</sup> The District Court found that the events satisfied the trigger requirement of the anticipatory search warrant, and that in any event, the officers acted in good faith under U.S. v. Leon<sup>49</sup>.

While Miggins was acquitted of having a weapon in furtherance of drug trafficking, he was found guilty of being in possession of the weapons. That conviction was used to enhance the sentence for the other offenses.

**ISSUE:** 1) Must the triggering event in an anticipatory warrant be fulfilled in order to execute the warrant?

2) Must there be a nexus between two properties to justify the issuance of a warrant to search a second property?

**HOLDING:** 1) Yes  
2) Yes

**DISCUSSION:** Although Moore argued that the triggering event was not fulfilled, because the men did not go back into the house after the delivery, the court concluded that it should avoid a “hypertechnical” construction of the warrant, and that it was sufficient that the package was accepted by someone who had

been inside the house just prior to the delivery. Thus, Moore’s conviction was upheld.

Miggins and McDaniels also argued that there was insufficient connection (nexus) between their apartment and Moore’s home to justify the issuance of a warrant to search their home. However, the Court disagreed, finding that the evidence presented in the affidavit, based upon items found upon the men when arrested, was more than sufficient to justify a warrant of their apartment.

**U.S. v. Bailey**  
**302 F.3d 652 (6<sup>th</sup> Cir. Tenn. 2002)**

**FACTS:** During the overnight hours of September 5-6, 1999, Officer Davidson and Captain Graham of the Morristown, Tennessee P.D. were investigating allegations of drug trafficking at the Royal Mobile Home Trailer Park. The officers did this by making traffic stops, when they could, of vehicles leaving the trailer under surveillance.

The officers encountered Bailey’s car when it entered the trailer park on the wrong side of the road, and Graham testified that Bailey “about hit me head on.” Bailey, however, stated that the police car was “hogging” most of the narrow road, but that he did have sufficient room to pass. As they passed, Davidson shouted at Bailey to stop, and when he did not, Davidson got out of his car and chased Bailey’s car on foot. He gave as reason for the stop the fact that Bailey was on the wrong side of the road, and that he “wasn’t

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<sup>48</sup> At the hearing, Watson testified that the three men did not have a key to the residence.

<sup>49</sup> 468 U.S. 897 (1984).

sure if [Bailey] was intoxicated or not.”

When Bailey stopped, Davidson approached the driver’s side. Davidson stated that Bailey kept reaching towards the floorboard. First he asked Bailey to keep his hands “to himself,” and then asked him to step out of the car. Officer Cox then arrived, and they waited for Officer Wisecracker to bring a drug dog. Within two minutes, Wisecracker had arrived and ran the dog. While the dog sniffed, Graham noticed that Bailey had his hand in his pocket, and told him to remove it; when he did so, Graham saw the butt of a gun. Bailey was arrested and handcuffed. Cox, trying to calm Bailey, told him that “everything would be OK,” to which Bailey stated “no, everything won’t be ok, there’s three ounces of cocaine in the car.” The drug dog did alert, and the officers found two more guns and three ounces of cocaine.

Bailey was indicted for firearms and drug trafficking offenses. He requested suppression, stating that the initial stop, and all that flowed from it, were in violation of his Fourth Amendment rights. The Court agreed and the government appealed.

**ISSUE:** May a traffic stop proceed longer than needed to satisfy the original purpose of the stop, if sufficient reasonable suspicion is met to prolong the stop?

**HOLDING:** Yes

**DISCUSSION:** First, the Court addressed the issue of the initial, allegedly pretextual, stop. The court found that it was irrelevant that the stop was pretextual, because the officers did have sufficient cause to stop Bailey for the traffic infraction. After the stop, the Court explored if the officers had “sufficient reasonable suspicion to detain Bailey after the purposes of the traffic stop had been accomplished.” Using Terry<sup>50</sup> principles, the Court noted that the “purposes of the traffic stop were never accomplished,” because the officers did not really pursue it, and had admitted the traffic stop was “just to look for other illegal activity,” but concluded that Bailey’s actions subsequent to the stop were independently sufficient to give rise to reasonable suspicion sufficient to justify the brief detention.

**Thomas v. Cohen**  
**304 F.3d 563 (6<sup>th</sup> Cir. Ky., 2002)**

**FACTS:** On December 7, 1998, an employee of the Augusta House<sup>51</sup> called Louisville police with a complaint about several residents, Thomas, Gibbs and Lewis, the plaintiffs in this action. The employee asked Officer Cushman, who responded, to remove the residents. Cushman spoke to the residents, but refused to remove them, and instructed the employee to proceed with an eviction action if necessary.

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<sup>50</sup> Terry v. Ohio, 392 U.S. 1 (1968).

<sup>51</sup> The Augusta House is a home for women. Each resident paid rent, had her own bedroom, and shared the rest of the house in common.

The next day, Zinous, the off-site manager, called again to have the residents removed. Officers Cohen, Craig, Embry and Fischer, defendants in this action, responded. Zinous told the officers that the residents had violated the rules by having alcohol and illegal drugs on the premises, and that they threatened other residents. She told them that eviction was “standard procedure” and asked them to remove the women. She had no court order or other documentation.

Thomas, Gibbs and Lewis allege the officers entered their rooms and told them to leave. They told the officers they paid rent, and had a letter from the Louisville Tenants’ Association, with whom they had been in contact, that indicated they had a legal right to stay. At one point, one of the women tried to call an attorney at the LTA, but the officer “told her she was homeless and did not have a lawyer,” and ordered her to leave. They were not able to retrieve all of their possessions before they left.

The Plaintiffs sued, and the officers requested summary judgment based upon qualified immunity. The trial court denied the motion, and the officers appealed.

**ISSUE:** May officers evict a person from their residence, without proper court orders?

**HOLDING:** No

**DISCUSSION:** The Court recognized that the Supreme Court, in Soldal v. Cook, County Illinois<sup>52</sup>

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<sup>52</sup> 506 U.S. 56 (1992)

had previously held that the participation of a police officer in an improper eviction, where the entire property, a mobile home which was physically removed, was a seizure under the Fourth Amendment. However, the Court found that it was not clearly established that such an eviction, where no one actually seized the property, was an illegal seizure. The Court did find that the actions of the officers, under the circumstances as outlined, were objectively unreasonable. The Defendants undertook no investigation to determine if their actions were appropriate, and ignored information that indicated that it may not be appropriate to go forward with the eviction. The officers admitted that they knew the sheriff’s office was responsible for evictions, not Louisville police. Finally, with regards to the officers, the Court determined that the officers should have known that these rights had been clearly established under both case law and Kentucky statutory law, which prohibits “self-help evictions.”

The Court upheld the denial of summary judgment with regards to the Plaintiff’s claims under the Fourteenth Amendment, but allowed the summary judgment against the officers with regards to the Plaintiffs’ Fourth Amendment claims.

**U.S. v. Townsend**  
**305 F.3d 537 (6<sup>th</sup> Cir. Ohio, 2002)**

**FACTS:** In the wee hours of June 16, 1999, Ohio Highway Patrol officers Eck and Chesser stopped a vehicle traveling east on I-70 at a

high rate of speed. From the beginning of the stop, the officers noticed several unusual factors. As they approached, the driver, Townsend, put his hands in the air. When told the radar indicated he was going 76 mph, he volunteered that he had been going 85. He had his documents ready when Officer Eck arrived. Eck believed Townsend's "behavior reflective of an unusual eagerness to end the stop quickly."

The officers were joined Officer Myers. All three officers testified that Townsend, and his passengers, acted nervous, frequently looking back at them. Townsend's name was on the insurance, but he was not the registered owner. When asked about the owner, the officer was told the owner was not present, in fact, it was Townsend's mother. Eck testified that was an important to him factor, since drug couriers usually do not own the cars they are driving.

Eck questioned Townsend and Green, a passenger, as to the purpose of their trip. Townsend said they had come from Chicago, and were traveling to Columbus to visit his sister. However, he did not know his sister's address; he planned to call her upon arrival. Eck found that odd, that Townsend would call his sister in the early morning hours. He also knew that Chicago was a "source city" and Columbus a "destination city" for drugs. The officers saw three cell phones and a Bible – which they also attributed to drug courier behavior.

The officers asked the occupants to get out of the car, and they were frisked. They found no weapons, but one officer did feel what he believed to be a large roll of cash. They also frisked the passenger compartment, finding nothing. They called for a canine unit, which arrived some thirty minutes later. The dog alerted on the trunk. They opened and searched the trunk, finding nothing. They dismantled a compact disk changer in the trunk, and found ten, apparently counterfeit, one-hundred dollar bills. They men were arrested for possession of counterfeit currency.

The trial court suppressed the currency, finding that there had been insufficient reason to detail the occupants longer than needed for the original traffic stop. The government appealed the decision.

**ISSUE:** Must officers ensure that factors used to support a traffic stop (that leads to an arrest) are sufficient to justify a lengthy detention and search?

**HOLDING:** Yes

**DISCUSSION:** The Court found itself charged with determining if the "combination of factors" in this case were sufficient for reasonable suspicion. The Court focused on several of these factors.

First, the Court found that the officer's reliance on Townsend's initial cooperative behavior was "a very weak indicator."

Second, the Court also discounted the officers' claim that their travel plans (visiting a relative in the middle of the night) were dubious.

Third, the officers' "analysis was makeweight" concerning the source and destination city claims, stating that particular trip was "entirely common."

Fourth, the Court noted that cellular telephones are "so much more common today than in 1992" when a court considered them to be "tools of the drug trade."<sup>53</sup> While it may seem slightly odd to have multiple, it was a very weak factor as well.

Fifth, the presence of the Bible was also quickly discounted.

Sixth, since there was never any evidence in the record about the cash found on the defendants, other than it was a "roll of cash," there was insufficient information to consider it a useful factor.

Seventh, since the officers were aware that Townsend had previously had a weapons charge, they agreed this might be sufficient to justify the frisk of the passenger compartment, but no more than that.

Eighth, the trial court had found the officers' testimony about the defendants' nervousness to be inconsistent and lacking in credibility.

Ninth, the Court found the officers' testimony about the condition of the car, littered with food wrappers and clothing, which they thought to

indicate an unwillingness to leave the car (and the presumed drugs), to also be incredible, as "it is not as if the defendants would have had to live in the car for days to drive from Chicago to Columbus."

Finally, the officers noted that the registered owner was not in the car, and that this also indicated drug trafficking, but the Court noted that record owner was Townsend's mother, and that Townsend was the insured, and that information was sufficient to negate the factor.

The appellate court upheld the suppression.

**Farm Labor Organizing Committee v. Ohio State Highway Patrol**  
**308 F.3d 523 (6<sup>th</sup> Cir., Ohio, 2002)**

**FACTS:** Jose Aguilar and Irma Esparza are permanent resident aliens in the United States. On March 26, 1995, they were driving from Chicago to Toledo to visit family. Trooper Kiefer, Ohio State Highway Patrol (OSHP), stopped them for driving with a faulty headlight. He asked for Aguilar's driver's license, which he produced.<sup>54</sup> Kiefer got Aguilar out of the car, and placed in the back of his cruiser.

A second OSHP officer arrived, with a drug dog, which he walked around the vehicle. The dog alerted. In fact, no drugs were ever found. The second trooper asked Esparza for ID. She offered an Illinois ID card, but he "reportedly grabbed her wallet

<sup>53</sup> U.S. v. Slater, 971 F.2d 626 (10<sup>th</sup> Cir. 1992).

<sup>54</sup> Aguilar possessed a valid Illinois operator's license.

and removed her green card.” She was placed in the back of Kiefer’s cruiser, along with Aguilar. Kiefer asked for, and received Aguilar’s green card.<sup>55</sup>

The troopers asked the pair “where they had obtained their green cards and whether they had paid for them,” trying to determine if they were forged. Both Aguilar and Esparza speak limited English, and they responded that they had paid for the cards – in fact meaning they had paid the required processing fees. Kiefer, however, interpreted this to mean they were likely forged. He attempted to contact the INS, but was unsuccessful, because it was a Sunday. He elected to keep the cards to hold for authentication and let them go. He “did not issue the plaintiffs a receipt for their green cards, tell them when they could expect them back if the cards were indeed authentic, or tell them where or how to inquire if they had any questions about the seizure.”

A few days later, after the pair had gotten an attorney, Kiefer returned the green cards to the attorney. He explained he’d been off a few days and was unable to reach the INS before that time.

Eventually this case was filed as a class action lawsuit, on behalf of all motorists similarly situated. All defendants except Trooper Kiefer were dismissed, and the court granted summary judgment to Aguilar and Esparza for the seizure of their green cards. However, the court specifically held that questions

about immigration status during a traffic stop were appropriate, as long as it kept within the bounds of the traffic stop and did not prolong it. Kiefer took an interlocutory appeal, and contended that he was entitled to qualified immunity because “his inquiries into the plaintiffs’ immigration status was motivated by the plaintiffs’ difficulties speaking and understanding English, which he contend[ed] is a legitimate race-neutral reason....”

**ISSUE:** 1) May Hispanic-appearing motorists be targeted for potential immigration violations?

2) May documents (such as green cards) be seized for verification and held for a prolonged period of time?

**HOLDING:** 1) No  
2) No

**DISCUSSION:** The Court found that there existed sufficient facts alleged that if proved, would “establish that Kiefer violated their rights under the Equal Protection Clause by targeting them for immigration-related questioning on the basis of their race.” The Court further found that such rights were clearly established prior to the trooper’s action.

The record indicated a variety of instances when the OSHP had pursued investigations against Hispanic drivers, even when no other factors indicated that they might be illegal. They noted that the officers had a list of immigration-related questions in Spanish, but in no other language. Troopers called to testify

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<sup>55</sup> In fact, both possess valid green cards.

admitted they would refer Hispanic motorists to the Border Patrol, when they would not do the same for someone who was not of Hispanic appearance.

The record also indicates that the OSHP were “in part, the product of a pattern and practice by the OSHP of questioning motorists about their immigration status on the basis of their Hispanic appearance.” The OSHP did not deny having become more active in immigration enforcement.

With regards to the seizure of the green cards, the Court also found that to be unreasonable. The temporary detention, based upon reasonable suspicion, might have been justified, but a full seizure could only be justified by probable cause, which Kiefer did not have. The Court agreed that a one-day seizure might have been permissible, but not four days. The seizure was “exacerbated by the undisputed fact” that he gave them no idea when they could expect them back.

The Court upheld the trial court’s denial of summary judgment for Kiefer, as well as the partial summary judgment in favor of the plaintiffs.

**U.S. v. McLevain**  
**310 F.3d 434 (6<sup>th</sup> Cir. Ky., 2002)**

**FACTS:** On December 28, 1999, Cauley failed to return from a work release to the Daviess County Detention Center. A CI provided information to Jailer Harold Taylor that Cauley might be found at the

home of Robert McLevain, in Maceo, and the jailer obtained a search warrant for that home, to search for Cauley. The supporting affidavit indicated a connection between McLevain and Lydia Bell, Cauley’s girlfriend. The affidavit stated that Bell’s movements that night suggested that she assisted Cauley in his escape. McLevain and Cauley were also known to be friends.

A warrant was issued, properly describing the property. The warrant indicated that Cauley and McLevain were to be seized, but did not indicate a reason for McLevain’s seizure.

Taylor sought assistance from the Daviess County Sheriff’s Office. The Sheriff’s Office knew that McLevain had a criminal drug record. At about 2 p.m., the warrant was issued and the officers proceeded to the residence. Officers entered both the front and rear, seized McLevain and “gained control” over his girlfriend and two children. They searched for Cauley. Looking under the bed in the master bedroom, Det. Acquisito, a narcotics officer, spotted a “twist tie and a cut cigarette filter.” Photos were taken, but the items were left in place. Another officer drew Acquisito’s attention to a spoon with residue on a tackle box in a sink in the garage, which a field test determined to be methamphetamine. A pill bottle filled with a clear liquid was also found. Acquisito identified these items as paraphernalia, and used them to obtain a second warrant. Returning with the second warrant, they found, inside a kerosene heater, 85 grams of meth,

\$5,170 in cash, plastic bags, syringes twist ties and scales. McLevain was charged with drug trafficking. Cauley was never found during these searches.

McLevain requested suppression, staying that the first pieces of evidence were not immediately incriminating, and thus did not support the issuance of the second warrant. The trial court denied the motion.

**ISSUE:** 1) May officers with a special interest (such as narcotics officers) “tag along” during the execution of a warrant?

2) May items with a slight connection to a potential crime be seized when the warrant is not connected to the alleged purpose of the items, and when the items are not inherently incriminating?

**HOLDING:** 1) Yes  
2) No

**DISCUSSION:** The Court addressed the prongs of the “plain view” exception, and how they applied in this case.

First, the Court addressed if the locations where the items were found could also conceal a grown man, and found that they could. The Court then concluded that the initial search warrant was deficient in naming McLevain as a party to be seized, with no accompanying explanation as to why, as no allegations were made against him. However, that deficiency was not fatal, and the warrant was otherwise

sufficient to support the officer’s presence in the house. The presence of the narcotics officers was also questioned, given the original reason for the search. The Court found, however, that the narcotics officers were properly “tagging along,” as they could, and did, assist in the search for Cauley, just as federal agents were allowed to “tag along” with state officers in U.S. v. Bonds.<sup>56</sup>

Third, the Court considered whether the items could immediately be recognized as contraband. The Court used the factors outlined in Beals<sup>57</sup> to assist in assessing this facet of the case. These factors include whether a “nexus exist between the seized object and the items particularized in the search warrant”, whether “the ‘intrinsic nature’ or appearance of the seized object gives probable cause to believe that it is associated with criminal activity” and whether “the executing officers can *at the time* of the discovery of the object on the facts then available to them determine probable cause of the object’s incriminating nature.”<sup>58</sup> The Court does not require that they know it is contraband, only that they reasonably believe that it is contraband.

Looking at the facts of the case, the first factor does not apply, as the warrant was not for drug related items. McLevain argues the second does not apply, either, and the court agreed that, while the officer’s

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<sup>56</sup> 12 F.3d 540 (6<sup>th</sup> Cir. 1993)

<sup>57</sup> U.S. v. Beal, 810 F.2d 574 (6<sup>th</sup> Cir. 1987)

<sup>58</sup> Emphasis in original

experience gave them the ability to read meaning into these objects, the connection between these items and illegal activity is not sufficient to make them intrinsically connected to such illegal activity. The Court also agreed with McLevain that the officers could not know at the time that these items were evidence of a crime. A recent unpublished opinion indicated that “when an item appears suspicious to an officer but further investigation is required to establish probable cause as to its association with criminal activity, the item is not immediately incriminating.”<sup>59</sup>

Finally, the Court found that the officers must have a lawful right of access to the items. If there was sufficient time to get a warrant, the officers should get a warrant. In this case, the proper time to get the warrant was before the spoon was seized and field-tested, not afterwards. As such, the court reversed the denial of the suppression request.

**Greene v. Barber**  
**310 F.3d 889 (6<sup>th</sup> Cir. Mich. 2002)**

**FACTS:** On March 12, 1997, Green, a 6-foot tall, 300-pound lawyer, went to the Grand Rapids Police Department offices to retrieve his vehicle, which had been towed. The office is in the courthouse.

At the courthouse he spoke to an intern, Lind, who was staffing the information counter, to discuss the fees being charge to return his car. Greene described his tone as an

“animated expressive voice,” different from his normal voice. He asked Lind why he was expected to pay fees for the time before he had received notice that his car had been towed. Lind could not answer the question, and he directed Greene to Lt. Barber, the supervisor. The two men engaged in a heated interchange.

Lind testified there were a number of people in the lobby during the discussion, and that all had taken notice of the exchange. Another intern testified that the noise was “interfering with the operation of the counter.” A third intern stated that while Greene was not screaming, his voice was loud enough to “attract the attention of other people in the lobby.”

Barber finally placed Greene under arrest and instructed him to place his hands on the counter. Greene refused and raised his voice, yelling that the arrest was illegal. He also called for the police chief (whom he knew) to “stop the arrest.”

Another officer, Hillyer, entered and hearing that Greene was under arrest, ran to assist, catching Greene as he backed away from the counter. Captain Gillis also assisted. At that point, according to Greene, “things just went ballistic.” He was sprayed with OC while the officers held him, and blinded, he stumbled across the lobby. The officers struggled to handcuff Greene. Finally, Chief Hegarty arrived and told Greene to “just cooperate....”

Greene was charged and tried, and acquitted by a jury. He sued on false

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<sup>59</sup> U.S. v. Byrd, 211 F.3d 1270 (6<sup>th</sup> Cir., 2000) unpublished opinion.

arrest and excessive force. The District Court awarded the defendant officers a summary judgment on the basis of qualified immunity, and Greene appealed.

**ISSUE:** May an otherwise lawful arrest be tainted by an improper motive, and therefore made unlawful?

**HOLDING:** Yes

**DISCUSSION:** The Court analyzed the case for qualified immunity under the rules of Saucier v. Katz.<sup>60</sup> The local ordinance under which Greene was charged was essentially equivalent to Kentucky's disorderly conduct charge. Admittedly Greene was in a public place, and even under his own version of the facts, it was reasonably arguable that he created a disturbance. However, under Bloch v. Ribar,<sup>61</sup> the Court found the law "well established" that "[a]n act taken in retaliation for the exercise of a constitutionally protected right (in this case speech) is actionable under §1983, even if the act, when taken for a different reason, would have been proper."

The Court analyzed the statements made, which included calling Lt. Barber an "asshole" and "stupid" and found that "the Constitution gave Mr. Greene no license to interrupt the transaction of public business by loud animadversions on Lt. Barber's personality and mental capacity, or any other subject, for that matter" ... "but, standing alone, the fact that Mr. Greene's remarks were unflattering

to Lt. Barber clearly gave Barber no license to abridge Greene's freedom to speak as he did." Quoting Bloch, the Court stated that "[g]overnment officials, in general, and police officers in particular, may not exercise their authority for personal motive, particularly in response to real or perceived slights to their dignity."

The Court found that in recent years, the "[s]tandards of decorum have changed dramatically" and "indelicate no longer places speech beyond the protection of the First Amendment." Because the standard is that the speech would incite a breach of the peace, the Court stated that "it is hard to imagine Mr. Greene's words inciting a breach of the peace by a police officers whose sworn duty it was to uphold the law."<sup>62</sup> In another case, where the term "asshole" was also directed toward an officer, the court quoted the U.S. Supreme Court,<sup>63</sup> stating that "the 'fighting words' doctrine may be limited in the case of communications addressed to properly trained police officers because police officers are expected to exercise greater restraining in their response than the average citizen ...." The Court went on to state that "[t]he freedom of individuals verbally to oppose or

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<sup>60</sup> 533 U.S. 194 (2001).

<sup>61</sup> 156 F.3d 673 (6<sup>th</sup> Cir. 1998).

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<sup>62</sup> However, the Court indulged itself in an "editorial aside," stating that "it is hard to imagine a member of a learned profession that once prided itself on civility addressing this kind of gutter language to an officer of the law – and doing so before 20 or 30 people in a hall of justice, of all places."

<sup>63</sup> Buffkins v. City of Omaha, 922 F.2d 465 (8<sup>th</sup> Cir., 1990) quoting Houston v. Hill, 482 U.S. 451 (1986).

challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”

Taking the case in the best light for Greene, as required in a summary judgment motion, the Court found that the right to be free from an arrest for such an improper motive was clearly established at the time of this occurrence.<sup>64</sup> The Court defined a “motivating factor” as “one that without which the action being challenged simply would not have been taken.” As such, the Court agreed that it was the responsibility of Lt. Barber, at trial, to “persuade a jury that Mr. Greene would have been arrested for disrupting the transaction of business even if the insults had been directed solely at the intern, for example, and even if there had been no personal pique on Barber’s part.” However, the Court found that it would be “usurping the role of the jury” should they attempt to answer the question at this stage of the proceedings.

However, Officers Hillyer and Gillis reasonably believed that Greene was resisting arrest and “had no reason to suppose that their conduct was in any way unlawful.” As such, they were entitled to qualified immunity for their part in his arrest.

Examining the excessive force allegation requires a second analysis. The court examined their conduct under the “objective

reasonableness” standard to be applied in Fourth Amendment use of force cases. While Greene’s offense was minor, he did appear to have been “actively resisting arrest” and refusing to allow himself to be handcuffed. For the purposes of this case, however, they conceded the Barber’s use of OC spray might be considered excessive, but found that the actions of the other officers were not. However, because Barber was acting within his department’s policy, the court found there was no reason for him to know that his conduct might be illegal, and concluded that the case must fail for that reason. All of the officers were awarded qualified immunity with regards to the use of force.

The Chief was also dismissed from the lawsuit, because he had no reason to believe there was any possible illegality with regards to the arrest at the time he arrived.

**Burchett v. Kiefer**  
**310 F.3d 937 (6<sup>th</sup> Cir. Ohio, 2002)**

**FACTS:** On July 9, 1998, members of the Ohio Bureau of Criminal Identification and Investigation (BCI) were asked to assist deputies of the Jackson County Sheriff’s Department in executing a search warrant in Oak Hill. The house belonged to plaintiff’s (Burchett) brother. When the officers arrived, Burchett, who lived next door, saw the unmarked vehicles and walked to the property line to investigate. Seeing the officers, wearing black clothes, bearing no identification and carrying weapons, Burchett became alarmed. The officers yelled at him

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<sup>64</sup> See McCurdy v. Montgomery County, Ohio, 240 F.3d 512 (6<sup>th</sup> Cir. 2001) summarized in the 2001-02 Legal Update.

to get on the ground, but instead, he ran for his baby, who was in the nearby porch swing. The officers pursued him. Just as he arrived at the porch, the officers seized him, and his wife emerged at the same time to pick up the baby. The object that one officer reported having spotted in his hand turned out to be sunglasses.

The officers attempted to handcuff Burchett, and Burchett admitted to a struggle. The officers pushed Burchett toward the patrol car, and he lost his footing and fell, the porch having a step down. Burchett reported having been “pushed very roughly” into the marked car that had arrived in the interim.

Burchett was kept handcuffed and in the vehicle for approximately three hours, while the search was executed. Although it was late in the afternoon, the temperature hovered around 90 degrees. During much of the time, the vehicle’s engine was turned off and the windows were rolled up, and the officers refused his request to roll down the windows.<sup>65</sup> Officers admitted in deposition that they were well aware of the heat. When he was finally released, his wife testified he was “sopping wet.”

Both Sheriff Kiefer and Agent Bliss of the BCI testified that Burchett was “in a rage” much of the time. At one point, when his wife and daughter came to the car, Burchett showed them that his hands were “swollen and blue.” Shortly thereafter, upon

promising to “behave,” Burchett was released. He was cited for disorderly conduct, but that charge was eventually dismissed.

Burchett and his wife both filed this lawsuit, alleging a variety of causes of action relating to the Fourth, Sixth and Fourteenth Amendments. All defendants requested and received qualified immunity and summary judgment, the District Court finding no constitutional violations.

**ISSUE:** 1) May a person be detained for a lengthy period of time without an arrest?

2) May tight handcuffs justify an excessive force claim?

3) Does failure to notify an individual of charges violate a constitutional right?

**HOLDING:** 1) No

2) Yes, but ....

3) No, but ....

**DISCUSSION:** The Court found Burchett’s initial detention, even though he had not yet set foot on the property, to be reasonable. The Court also found the handcuffing, in and of itself, to be reasonable, under the circumstances. However, the Court was concerned about the tightness of the cuffs, and found that “the right to be free from ‘excessively forceful handcuffing’ is a clearly established right.”<sup>66</sup> However, because apparently the cuffs were removed almost immediately after Burchett made his first complaint, the Court did not find this situation to violate any right.

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<sup>65</sup> Officers reported that the windows were rolled up after he began spitting at passers-by, but offered no evidence on the record to that effect.

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<sup>66</sup> *Kostrzewa v. City of Troy*, 247 F.3d 633 (6th Cir. 2001)

The Court did find a constitutional violation in the lengthy detention in the unventilated car, however, and found that the right was clearly established at the time, by the Court's early finding in Hope v. Pelzer.<sup>67</sup> The Court agreed, however, that only officers who were aware of the length and circumstances of Burchett's detention could be held liable for the detention, and those individuals charged with such knowledge were Sheriff Kiefer and Agent Bliss. The Court dismissed the Sixth Amendment violation, holding that the officers violated no specific constitutional right by failing to notify Burchett of any charges against him. However, this is a requirement under Kentucky law, and failure to do so may result in state claims.

**Hinchman v. Moore**  
**312 F.3d 198 (6<sup>th</sup> Cir. Mich., 2002)**

**FACTS:** On June 5, 1997, in Livingston County, Michigan, passing motorists discovered the body of Thomas Margeller, Jr. Linda Margellar, the victim's former wife, agreed to assist the officers. She called her friend Hinchman to provide emotional support, and Margeller went to stay at Hinchman's home.

Officers searched Linda Margeller's residence and discovered evidence that indicated that Thomas Margeller had been murdered in the garage. Subsequently, Linda admitted that she and her brother killed him.

Because she had been staying at

Hinchman's apartment, the officers wanted to interview Hinchman. However, she refused to speak to them, talking to them through her closed door.

The officers discussed the matter, and the officers returned to the apartment to await the arrival of an investigative subpoena. When they arrived, they saw Hinchman leaving the apartment with a laundry basket of clothes. As the officers approached, she placed the clothes basket in her car, sat behind the wheel and closed the door.

Officer Dombrowski asked her to stay, explaining the subpoena was on its way, but she refused. She started the engine. Hinchman later testified that Officer Moore was "holding the car" with his hands on the trunk, but that he moved aside when she said she was leaving. She then backed up and left.

Moore, however, stated that she shifted into reverse and backed into him, stopped, and then backed up again, striking him a second time. She then drove away.<sup>68</sup>

The officers followed her; she obeyed all traffic laws. They requested and received assistance from Michigan State Trooper Taylor, who stopped Hinchman and arrested her for assault. At that time, hand prints were visible on the rear of the car, presumably Moore's.

Hinchman was held over for trial, after a preliminary hearing. She was eventually acquitted. She then sued

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<sup>67</sup> 536 U.S. 730 (2002)

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<sup>68</sup> Apparently Moore was not injured.

for the alleged violation of her Fourth and Fourteenth Amendment rights, as well as state claims. The Court dismissed the case, and awarded the defendant officers' attorney's fees. The officers claimed collateral estoppel, and the Court concluded that since a judge had found probable cause to hold her over for trial, that she could not then claim that she was falsely arrested. The Court awarded qualified immunity to the officers.

**ISSUE:** May an individual indicted for an offense later claim false arrest?

**HOLDING:** Yes

**DISCUSSION:** The Court looked back to the case of Darrah v. City of Oak Park.<sup>69</sup> In that case, the Court held that "a finding of probable cause in a prior criminal proceeding does not bar a plaintiff in a subsequent civil action from maintaining a claim for malicious prosecution under Michigan law where the claim is based on a police officer's supplying false information to establish probable cause." The Court found that Darrah "compel[ed] our conclusion that collateral estoppel does not bar Hinchman from asserting her claims."<sup>70</sup>

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<sup>69</sup> 255 F.3d 301 (6<sup>th</sup> Cir. 2001), which was summarized in the 2001-02 Legal Update.

<sup>70</sup> However, the Court stated that he found "the logic of Darrah's collateral-estoppel holding questionable," because a criminal court judge "must necessarily take into account the veracity of the officers' statements" in making a probable cause determination. However, the Court found that precedent allowed Hinchman a "second bite at the probable-cause apple."

Looking at the merits of Hinchman's case, the Court discussed whether she had in fact committed a "felonious assault."<sup>71</sup> Accepting Hinchman's version of the encounter, as the Court is required to do at this state in the proceedings, the Court found that a "rational factfinder" would not "conclude that the officers' fears of an immediate battery" to be reasonable, given that they stayed in close proximity to the car as she pulled out.

In the alternative, the officers requested qualified immunity for the arrest. Because Hinchman alleged that the officers "lied in order to manufacture probable cause," the Court stated that "[f]alsifying facts to establish probable cause to arrest and prosecute an innocent person is of course patently unconstitutional and has been so long before the defendants" made the arrest. As such, the Court found that qualified immunity was inappropriate.

**Lingler v. Fechko**  
**312 F.3d 237 (6<sup>th</sup> Cir. Ohio, 2002)**

**FACTS:** "On what must have been a slow day for crime in Seven Hills, Ohio, police officers James Lingler and Jeffrey Gezymballa ... decided to tidy up the station house." In the course of the cleaning, the officers, who are co-defendants, removed some old furniture from the training room and placed it in the dumpster.

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<sup>71</sup> Note that under Michigan law, assault is the fear of an immediate battery, a different offense than a Kentucky assault charge. The equivalent charge in Kentucky would be Assault in the Third Degree.

Chief Fechko, however, had not authorized this action. When he found the furniture missing, he ordered a “full investigation.” “Suspicion soon fell on Officers Lingler and Gezymalla, whose daily activity logs made reference to ‘station cleanup.’”

Officer Gezymalla was called in, and readily admitted to disposing of the furniture. The Chief told him that his actions could be considered theft, and “spoke of reading the officer his rights.” Next Officer Lingler was questioned. At first he denied knowledge of any theft, but when pressed about the “station cleanup,” he too readily admitted to removing the junk furniture. Lingler asked to have an attorney present. Both officers were ordered to provide detailed written statements about their actions, and they objected, and Lingler again asked for an attorney. The Chief “said the matter was not criminal,” and ordered them to produce the statements.

The first statements “described the cleanup efforts generally but made no reference to the furniture.” The Chief viewed this as a failure to comply with his order, and started disciplinary proceedings. After talking to counsel, the officers produced more detailed statements. As far as the record indicates, at no time was either officer required to waive their constitutional privilege against self-incrimination.

The Chief recommended a 30 day suspension, which the Mayor rejected, and in fact, no punishment

ensued. The Chief also recommended criminal action, but again, nothing occurred. The officers sued the chief under 42 U.S.C. §1983 for violation of the constitutional privilege against self-incrimination, and a state law claim. Both were dismissed by the court, and the officers appealed.

**ISSUE:** May statements written by officers, and produced as a result of a direct order, be used against officers in a criminal action?

**HOLDING:** No

**DISCUSSION:** The Court found that since the statements were never used against the officers in a criminal prosecution, there was no violation. Of importance, however, is that the Court did agree that under Garrity<sup>72</sup>, the statements could not have been so used. The Court found that it was appropriate for the Chief to take the statements, and to use them in administrative proceeding, but because they were not required to waive their privilege, no constitutional claim can prevail.

**U.S. v. Cope**  
**312 F.3d 757 (6<sup>th</sup> Cir. Ky., 2003)**

**FACTS:** On May 8, 1998, Randall Cope was arrested on a complaint of Internet harassment and credit card fraud. He had logged onto Sarah Jackson’s e-mail account and sent threatening messages to her acquaintances. He had also used her credit card to buy computer equipment. Cope and Jackson had previously had a relationship that

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<sup>72</sup> Garrity v. New Jersey, 385 U.S. 493 (1967).

had terminated some six months before.

When he was arrested, he consented to a search of his car. Officers found a revolver. He was released on bond. Prior to Cope's trial, scheduled for February 1999, Marshall County officers arrested him, on December 26, 1998, for harassing communications; he had left nude pictures of Jackson on her father's driveway. His release was revoked and he was returned to jail.

At some point during this time, Shirley Shepherd, a local gun dealer had a conversation with Cope. Shepherd reported that Cope's brother, Terry Cope, had said that Randall Cope "had a problem," and that if a certain witness disappeared, his brother would no longer have the problem. At that time, Terry Cope was under state criminal charges in Tennessee.

Randall Cope's sister posted bond for Jason Griffith, one of Randall's cellmates, on January 17, 1999. In exchange, Griffith was to "knock off" Jackson. Randall told Griffith he would receive a phone call, which he never received. He also told Griffith that a family member would kill Jackson if Griffith did not. Randall had also asked a business partner, Charles Stewart, why Jackson would not date him. Stewart replied that Jackson was afraid Randall would kill her. Randall told Stewart that he would not kill Jackson, but that he knew people that would kill her, for him.

Several days later, Jackson and her son, in Florence, were fired upon. Five bullets were found in the car. The rifling indicated they could have been fired from one of the .38 revolvers, four in all, found at the homes of Cope's father and brother, Terry. But, the rifling pattern was not unique to those particular weapons, but could have come from literally millions of other handguns with the same rifling characteristic. Jackson could not identify the shooter, but assumed that Randall was involved. He had reportedly told her that he wished his ex-wife, Sandy, in Colorado, would be killed.

Two other inmates reported conversations with Randall about killing Jackson. Randall told Clay that his family would hold her accountable if something happened to him. He talked to Hiatt (one of the prisoners) about having her killed as well. Hiatt contacted the FBI, who told him to give Randall the name and number of "Bill," who was in fact a Campbell County undercover police officer. Upon receiving this information, Randall wrote to Terry, giving Terry the contact information. He also wrote other incriminating letters, suggesting his involvement in the shooting and asking his father to meet with a contract killer about the Nimmos.<sup>73</sup> Randall's father and brother apparently did make an attempt to contact "the Hungarian," a contract killer.

On the same day they attempted to find the Hungarian, Terry Cope went to the Covington office of the United

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<sup>73</sup> Elizabeth and Ronald Nimmo are Terry's former wife and her husband.

States Attorney, seeking AUSA David Bunning. He also asked if a large pocketknife was considered a weapon, and showed it to the assistant there. He was told Bunning was not available, and he left. Later that day, Terry met with "Bill," and provided information about Jackson. He gave "Bill" a \$2,500 down payment, with the same amount to be due after the killing. The undercover officer was recording the conversation. Terry told him that he might want Bill to murder others "down south," if things went well.<sup>74</sup> Terry was immediately apprehended.

While being interrogated, Terry agreed to a search of his truck, where an additional \$2,500 was found, along with the incriminating letters. Randall and Terry were indicted on a variety of charges. Both were convicted of all charges except that of a plot to kill Bunning. Both appealed.

**ISSUE:** May the Carroll search doctrine be used without exigent circumstances?

**HOLDING:** Yes

**DISCUSSION:** Terry Cope argued that the search of his truck was invalid. The Court examined the issues under three different search theories – consent, Carroll search and search incident to arrest. The Court elected to resolve the matter under the Carroll search doctrine, also called the vehicle exception doctrine, finding that the officers had

sufficient probable cause to justify the search of the truck.

**U.S. v. Miller**

314 F.3d 265 (6<sup>th</sup> Cir. Ky. 2002)

**FACTS:** On July 25, 2000, Sheriff Tim Fee, Jackson County, received information from an informant, Tony Haas, about an indoor marijuana growing operation. Haas claimed that he had observed the grow operation at the mobile home residence of Carl Miller (the defendant) while he was doing electrical/plumbing work at Miller's new home on the property. He had entered the mobile home at Miller's invitation, and viewed the operation. He then contacted the Sheriff.

The next day, July 26, Haas was again invited into the trailer, and again, he contacted the Sheriff to share that information. As a result of this tip, the Sheriff accompanied Haas to the trailer and observed the area, he recorded directions and mileage to the mobile home, he checked county records to verify the owner of the mobile home, and learned of Miller's nickname, "Hippy." Sheriff Fee then requested and received a search warrant, on July 27.

Upon execution, the Sheriff found a mobile growing operation, consisting of over 300 plants, a pound of processed marijuana and various items of paraphernalia. Miller was present and advised of his rights, and he admitted ownership of and responsibility for everything found. He was arrested and indicted on three federal narcotics charges. He moved to suppress all evidence,

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<sup>74</sup> The Nimmos live in Tennessee.

claiming the warrant was “facially invalid” as it did not satisfy probable cause. The Magistrate

**ISSUE:** Was the investigation sufficient to issue a search warrant?

**HOLDING:** Yes

**DISCUSSION:** Miller argued that the information provided by the informant, and corroborated by the sheriff, was so insufficient as to invalidate the warrant, in part because it was based upon information provided by an informant, and was not the direct observation of a law enforcement officer. The Court however, agreed that the information was sufficiently credible as to be relied upon by the sheriff, and the judge who signed the warrant.

**U.S. v. Bass**  
**315 F.3d 561 (6<sup>th</sup> Cir. Tenn. 2002)**

**FACTS:** On June 2, 2000, James telephoned the Jackson, Tennessee police department to report a disturbance at an apartment building. Officer Ellis responded, and located James. Officer Headen arrived at about the same time.

James explained that she had witnessed a male fire several gunshots at two other men, one of which was her son, and flee to an apartment, which she identified. The officers, joined by others, formed a perimeter around the building. Sgt. Jones, along with Ellis and Headen, went up to knock at the door. Niketa Jordan answered their knock, and

stated that her children and her husband, Shawn Bass, were there.

The officers immediately entered and commanded Bass to appear. Bass emerged from the bedroom and was immediately handcuffed. Ellis did a protective sweep, and when checking the bed, he located a sawed-off shotgun between the mattress and box spring. He also discovered empty casings from a handgun. When confronted with the casings, Bass admitted shooting at the two men because they had robbed him earlier.

Bass was indicted for knowingly possessing a firearm as a felon, and having an unregistered, sawed-off shotgun. He requested suppression of the shotgun, stating that the entry into the apartment was unlawful. The trial court denied the motion. Bass took a conditional plea of guilty and entered this appeal.

**ISSUE:** 1) May officers enter a residence under hot pursuit, when they have never been in visual contact with the suspects?

2) May officers look between a mattress and box springs on a sweep search?

**HOLDING:** 1) Yes  
2) Yes

**DISCUSSION:** Bass had offered two reasons to suppress the evidence of the shotgun. The Court held that two separate reasons justified the entry into the apartment and the discovery of the weapon – hot pursuit and the risk of danger to

police or others. The officers arrived within minutes of the shooting, and immediately pursued the alleged shooter to the indicated apartment. They also were correct in sweeping the apartment. Ellis discovered the shotgun when moving the box springs to look under the bed, which could have concealed a person.

**U.S. v. Cole**  
**315 F.3d 633 (6<sup>th</sup> Cir., Tenn., 2003)**

**FACTS:** On November 23, 1996, at about 10:30 p.m., Officer Gilbert and Sgt. Jones were driving down a street in Milan, Tennessee. A car approaching from the other direction crossed the center line in front of them. The officers took evasive action to avoid a collision, and then turned to pursue the vehicle. After a false stop, the vehicle finally stopped.

Then, the rear passenger-side door opened, but no one got out. Then the rear driver-side door opened, and Cole got out. The officers approached. Cole walked toward Jones, and stated that he didn't have any drugs. Jones replied he was going to handcuff Cole "for safety reasons" and did so. Gilbert, who had been exploring the area with a flashlight, said that he had found a handgun in the ditch.

Jones immediately asked Cole who owned the gun, and Cole said that he owned it, but that someone else had been carrying it. He had not been given his Miranda rights at that time. Jones arrested Cole and Gilbert and another officer transported him. Jones joined them

at the station, and Cole harangued Jones, arguing that it was unfair to charge him with possession of the gun. Gilbert was transported to the jail, and during that time Jones advised Cole of his Miranda rights. Cole volunteered the same statements about the gun as he had made previously.

Cole was eventually convicted on federal firearms charges. Cole appealed. He argued that he had made "one continuous statement which cannot be broken up into pieces which began from the initial question by" Jones.

**ISSUE:** May statements repeated after Miranda rights are given, that are substantially identical to statements given before the warning, be admitted?

**HOLDING:** Yes

**DISCUSSION:** The Court upheld the government's claim that the statements were spontaneous and voluntary, and that those statements made after the Miranda warning were admissible.

**U.S. v. Carter**  
**315 F.3d 651 (6<sup>th</sup> Cir. Ky. 2003)**

**FACTS:** On March 21, 2000, Lexington officer used a CI to purchase crack cocaine at a "crack house." The CI told the officers that Sean Carter and Calvin Holliday were going to leave the crack house to get more crack, and provided a vehicle description.

The officers followed the vehicle to a Red Roof Inn, where two men (Carter and Holliday) emerged and entered a room. Eventually, Holliday left the room, got into the car and attempted to leave. The officers stopped the vehicle, smelled marijuana and saw marijuana in the vehicle. They arrested Holliday and searched him, finding 17 grams of crack.

They returned to the motel and knocked on the door of the room the men had entered earlier. They knocked twice, stating that they were housekeeping, but Carter did not open the door. They knocked again, twice more, but did not identify themselves. Two of the officers were in plain clothes but with police vests, and the third was in uniform.

Finally, Carter opened the door, and the officers immediately smelled marijuana. The spotted a marijuana "blunt"<sup>75</sup> in a nearby ashtray. The officers identified themselves. They asked Carter for permission to enter, and he stepped back. Officer Hart immediately proceeded to the ashtray, picked up the blunt and confirmed his suspicion. Carter was arrested, and incident to his arrest, a search of his person resulted in 12 grams of crack and over \$1,700 in cash.

Carter argued that Hart could not have known for sure the cigar was, in fact, a blunt. However, Hart, who had been a narcotics officer for 6 years, stated he had probable cause

to believe that it was marijuana, by his observations.

Carter was indicted and took a conditional plea of guilty, reserving the right to challenge the validity of the "search."

**ISSUE:** May an officer's entry into a property be justified upon a plain view observation of what is reasonably believed by the officer to be contraband?

**HOLDING:** Yes

**DISCUSSION:** The Court found that the officers properly seized the blunt, believing that if they did not immediately do so, the evidence might disappear. Carter had also argued that the officers impermissibly created the exigent circumstances, by pounding on his door, but the court dismissed this argument. The Court placed weight on the fact that the officers did not search the entire room, but only seized that which was in plain view.

**Crockett v. Cumberland College**  
**316 F.3d 571 (6<sup>th</sup> Cir. Ky., 2003)**

**FACTS:** On December 3, 1998, two female students Jane Doe and Sally Roe<sup>76</sup> accompanied three male students, Bostic, Crockett and Greene<sup>77</sup> into a male dormitory at Cumberland College. The five engaged in dancing, tickling and slap boxing, and at one point, one of the women, apparently Roe, became intimate with Crockett. Another male

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<sup>75</sup> The Court defines a blunt as a hollowed-out cigar packed with marijuana.

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<sup>76</sup> The court omitted the names for privacy reasons.

<sup>77</sup> Greene is a co-defendant.

student, Demetrus Shannon, entered the room and within minutes, Bostic held Doe while Shannon touched her, and then raped her. At some point, Roe looked up and saw Shannon. She “finally got away from Crockett” and went to help Doe get away from Shannon and Bostic. As Roe approached, Greene grabbed her and pulled her on top of him. She struggled. She saw Doe hitting Bostic on the back and telling him to get off. Roe saw Shannon, partially undressed. Roe recognized that Doe was “not laughing any more” and tried to help, but Greene continued to restrain her.

Shortly afterward, another male student, Philips, knocked. The light was turned on and Doe dressed, told Philips and Shannon that nothing was wrong and left the room. Roe left shortly afterward. Crockett and Greene also returned to their dorm rooms. Roe and Doe met outside, and Roe learned that Doe had, in fact, been raped. Together, they reported the incident to Dean Carter.

College personnel took Doe and Roe to the nearby hospital for an exam. Carter informed the local police (Williamsburg) and Vice-President Colegrove of the rape, and Carter also filed a campus and police report.

Eventually, all four of the men were brought to the Student Center, where Colegrove questioned them. They denied all knowledge of the rape. Chief Hamlin, of Williamsburg went to the hospital and questioned both of the women. The Whitley County Attorney, Kersey, also interviewed

the women. They prepared arrest warrants for the four, alleging rape, facilitation and complicity to rape. The warrants were sent by another officer to the judge for signature, and Officer Miller proceeded to arrest the four men. Crockett and Greene were never indicted, but they were suspended from the college, the college revoked their scholarships and they received failing grades in all classes.<sup>78</sup>

Crockett and Greene sued the college, Colegrove, the City of Williamsburg and Chief Hamlin on a myriad of issues.<sup>79</sup> The Court denied summary judgment to the parties on most of the issues, dismissing only the malicious prosecution. The defendants took an immediate appeal on the denial of qualified immunity.

**ISSUE:** Must an officer continue investigating a crime, after probable cause has been met for an arrest?

**HOLDING:** No

**DISCUSSION:** The Plaintiffs argued that Hamlin’s investigation did not uncover enough probable cause to arrest, but the Court held that there was sufficient evidence to arrest Crockett and Greene on charges related to the rape. The Court agreed that “[o]nce an officer establishes probable cause, he or she is under no obligation to continue investigating and may

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<sup>78</sup> There is no information as to the fate of Bostic and Shannon.

<sup>79</sup> However, Hamlin and the City did not raise the issue of qualified immunity until their reply brief.

instead pursue the arrest of a suspect.”

The Court then engaged in a discussion of the crime of complicity. They pointed to two “separate and distinct theories” – complicity to the act and complicity to the result. The Court found that if Crockett and Greene were accomplices, they were complicit in the act, and that charge required intent. Hamlin’s investigation had indicated that Greene and Crockett had prevented Roe from assisting Doe even though she struggled and attempted to do so. In hindsight, it might be possible to state that they did not intend to facilitate the rape, but given the information at the time, it was certainly plausible that they had planned their actions. The warrant, while minimal, was not insufficient. Simply because Crockett and Greene were not indicted “does not invalidate Hamlin’s finding that probable cause to arrest them existed.”

The Court reversed the denial of qualified immunity for Hamlin.

**U.S. v. Campbell**  
**317 F.3d 597 (6<sup>th</sup> Cir., Ohio, 2003)**

**FACTS:** On December 2, 1999, Corp. Haggerty of the Missouri State Highway Patrol stopped a van driven by Lynce. A search of the vehicle revealed luggage containing 116 pounds of marijuana. Upon arrest, he agreed to cooperate, and stated to DEA Agent Guijas that he was en route from California to Cincinnati to make the delivery, to a Kenneth Green.

They took Lynce to Cincinnati to complete the delivery, and taped calls between Lynce and Green. Although much of the conversation was in code, Lynce confirmed at trial that they were talking about marijuana. He also testified that he knew Green, having met him while serving as a bodyguard for someone else. He also made multiple trips for Green, transporting marijuana. He testified that he had transported drugs to the home of Campbell (the defendant in this action). He completed the delivery to Green, as agreed, at Green’s downtown nightclub. When he arrived, he went inside the building and returned to the van with Campbell, who worked for Green. They took the luggage inside, and the agents immediately entered. The searched Campbell’s car and found almost four pounds of marijuana in the trunk. Both Campbell and Green were arrested that night.

A few days later, DEA agents executed a search warrant at Campbell’s apartment. His girlfriend was there, and she told agents that she had taken items from the apartment, where she lived with Campbell, to an empty apartment upstairs. The landlord was contacted, he confirmed the upstairs apartment was vacant, and he agreed to a search. They found a ledger, scales, shotgun shells and marijuana residue. Green’s prints were on the ledger and Ellis testified that she recognized many of the names.

Green and Campbell were convicted, and appealed. While multiple issues were appealed, only the search is relevant in this summary.

**ISSUE:** May officers search an apparently vacant apartment solely on the permission of the landlord?

**HOLDING:** Yes

**DISCUSSION:** The Court found that the agents properly searched Campbell's designated apartment. Upon learning from his girlfriend that items had been moved to an upstairs apartment, they sought permission from the owner, by phone, to search the apartment. They were assured that no one was leasing the apartment, although Green alleged that he had in fact paid rent on the vacant apartment. The Court found that the agents reasonably relied upon the owner's apparent authority to give consent.

**Danis-Shook Joint Venture XXV v. Secretary of Labor**  
319 F.3d 805 (6<sup>th</sup> Cir., Ohio, 2003)

***Note: Although this case involves an OSHA violation against a private company, it is an excellent illustration of certain requirements of OSHA. Kentucky OSHA (through the Kentucky Labor Cabinet) enforces its own OSHA code, and has adopted many of the federal OSHA provisions by reference, including the ones at issue in this case. And, unlike many states, OSHA requirements are applicable to public responders as well as employees of private companies.***

**FACTS:** The plaintiff companies were involved in a joint venture to construct an expansion of the Beavercreek wastewater treatment plant. Part of the work involved constructing two large containment basins to provide additional storage capacity. To prevent water from draining from the basins, and to prevent falling injuries until they were completed, they plugged the large (42-inch diameter) drains with wooden covers. Those plugs remained in place through the winter.

In the spring, it was discovered that water (rainwater and snowmelt) had accumulated in the basins, to a depth of almost three feet in the center, where the drain was located. (The floor of the basin sloped down to the drain from all sides, so the depth varied.) To drain the basins, employees wearing protective gear waded into the water and drilled three holes into each wooden cover. This sufficed to drain most of the water. The workers who performed this task wore buoyant vests, safety lines and other safety equipment.

However, enough water remained that the foreman (Wagner) of a crew deciding to work on that basin decided that it needed to be completely drained, so they could finish the work on that basin. Wagner put on a pair of waders (and no other safety equipment) and walked into the water toward the drain – the water was approximately 32 inches deep at the drain. Other employees watched him pull away a sheet of plastic, and “thumping” the plug. Apparently the plug dislodged,

and Wagner was “sucked down the drain and drowned.”

An OSHA safety specialist arrived at the site to investigate. Eventually, she recommended, and the companies were cited, for several serious violations: failure to provide a safe workplace, a violation of 29 C.F.R. §1926.21(b)(2)<sup>80</sup> – failing to instruct employees in the recognition and avoidance of hazards associated with entering a basin filled with accumulated water – and 29 C.F.R. §1926.95(a)<sup>81</sup> – failing to require employees entering the water in the basin to wear appropriate personal protective equipment. The administrative law judge (ALJ) vacated the first citation, that was not appealed. However, the ALJ also vacated the second citation, but let the third citation stand. Various appeals followed.

**ISSUE:** Must employees be trained concerning hazards they are expected to encounter?

**HOLDING:** Yes

**DISCUSSION:** This case illustrates the need for agencies to be aware of how various OSHA regulations may impact their operations. The Secretary of Labor argued successfully that the materials and training provided to employees was not sufficient to ensure that Wagner appreciated the danger of working in that area.

This Court also considered the assertion by the employer that

Wagner had been involved in three conversations with supervisory in weeks previous to the incident addressing the use of the protective equipment by the workers who drilled the holes.

Next, the court addressed the point that Wagner was a foreman, a supervisor, and that all of his crew had been foremen, as well. If they could not appreciate the danger, how could other workers do so? The Court stated that “[t]his is the precise situation that the regulations seek to avoid. Employers cannot count on employees’ common sense and experience to preclude the need for instructions.” In addition, the Court stated, “[I]n cases involving negligent behavior by a supervisor or foreman which results in dangerous risks to employees under his or her supervision, such fact raises an inference of lax enforcement and/or communication of the employer’s safety policy.”

Finally, because the rule stated that equipment was to be worn “as needed,” the court found that the “rule on personal protective equipment was discretionary and not mandatory, and this was insufficient.” The court upheld the citations by OSHA.

**Chapman v. The Higbee Corporation**  
**319 F.3d 825 (6<sup>th</sup> Cir. Ohio, 2003)**

***NOTE: This case is a continuation of a case by the same name that has been summarized in Legal Update 2001-02. This case***

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<sup>80</sup> Adopted in Kentucky as 803 KAR 2:402

<sup>81</sup> Adopted in Kentucky as 803 KAR 2:404

***changes the result in the previous iteration of the case.***

**FACTS:** On February 20, 1997, Chapman, an African-American female, was shopping at Dillard's Department Store<sup>82</sup> in Cleveland. She entered a fitting room to try on some clothing. When she entered the room, she noticed a sensor tag on the floor, but ignored it. She decided not to purchase the clothing and went to return the items to the racks.

A sales assistant then noticed the tag and suspected Chapman of shoplifting. She called for a security officer, an off-duty sheriff's deputy, wearing his official uniform. As an employee of Dillard's, the deputy was obligated to obey Dillard's rules, which prohibited strip searching and indicated that if stolen items are believed to be on the individual's person, that the police were to be called.

The guard and a female manager searched her purse, where nothing was found. He directed the manager to check Chapman's clothing, which she did, but having her remove her coat and suit jacket, and lift her shirt. Nothing was found, the manager apologized, and Chapman left the store.

As a result, Chapman brought suit against Dillard's under both 42 U.S.C. §1981 and 42 U.S.C. §1983. Chapman was originally denied relief, in part because the previous opinion held that the deputy was not

a "state actor," as required by §1983, and sought review.

**ISSUE:** Is an off-duty officer in uniform a state actor for federal civil rights purposes?

**HOLDING:** Possibly

**DISCUSSION:** Chapman argued that the deputy had indeed been a "state actor" under federal law, primarily because the deputy was in uniform, and took an action (ordering the "strip search") that Dillard's own policy did not allow for their security officers. The Court found that a reasonable jury could find that the deputy's appearance, in uniform, and the deputy's action, ordering a strip search, could be attributed to a state action. In addition, if Chapman did not feel free to leave, because of the deputy, a jury might consider it a "tacit arrest" and as such, state action. The Court reversed its previous dismissal of the action and returned it to the trial court for further action.

***NOTE: If an officer is held to be a state actor, the employing law enforcement agency may be implicated in the lawsuit.***

**Feathers v. Aey**  
**319 F.3d 843 (6<sup>th</sup> Cir., Ohio, 2003)**

**FACTS:** On April 31, 2000, at approximately 1:25 a.m., Akron 911 received a call reporting that a "white male with a beard" on a porch on North Howard Street "had pointed something at the caller and told the caller to shut up." The caller reported that the man was "pretty

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<sup>82</sup> The Higbee Company does business as Dillard's Department Store.

drunk.” He identified the house as “two houses from the corner.” Dispatch sent to officer to 708 North Howard Street to “check for a signal 9, supposed to be carrying a weapon ... Signal 9 is on the porch near the corner, it’s a white male with a beard, no shirt, possible 4, he pointed something at a caller, so he possibly has a weapon.”<sup>83</sup>

Officers Aey and Donohue were nearby, and they went to 708 North Howard. Realizing the address was incorrect, they looked around and saw Feathers on a nearby porch. Believing he matched the description given, they pulled over to his address, at 728 North Howard. They saw Feathers and his wife, Kathleen, hugging. Feathers was wearing shorts and sandals, but no shirt. They shouted at Feathers to move to the other end of the porch, which he did. They ignored Kathleen, who was questioning their conduct, and ordered Feathers to remove his hands from his pockets. He did not immediately comply, but upon being asked a second time, did so, but he put them back in his pockets, and again they repeated the instruction and he removed them. Finally Feathers turned away and went toward the door into the house. Leaning in, he told his father to come outside with the video camera. The officers ran up the steps and grabbed him, pinning him face-first against a pillar. At some point, Aey’s

finger was bitten.<sup>84</sup> As Aey held Feathers, Donohue called for backup, which in fact was already on the way. The officers arrested Feathers and searched him. They found that Feathers had a Leatherman utility knife<sup>85</sup> in his pocket.

Feathers was charged with assault against a police officer, carrying a concealed weapon and resisting arrest. At trial, the court dismissed the weapons charge and the resisting arrest charges, and a jury acquitted him of assaulting the officer.

The Feathers filed suit under 42 U.S.C. §1983 against the officers and the City of Akron, alleging that they violated Feathers’ Fourth Amendment rights, that the City had failed to train the officers properly, and that they violated various state law rights as well. The District Court dismissed the claims against Akron, the state law claims and the claims by Kathleen, but refused the request by Aey and Donohue for summary judgment, finding that there was sufficient information provided so as to raise a question about the legality of their seizure of Feathers.

**ISSUE:** May an officer base a Terry stop upon information given to them by dispatch, when that information is given by an anonymous tip?

**HOLDING:** No, but ....

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<sup>83</sup> Signal 9 is “suspicious person” and Signal 4 is an “intoxicated person.” In addition, the opinion does not indicate that the caller stated the individual was not wearing a shirt, so it is unclear why the dispatcher reported that the subject was shirtless.

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<sup>84</sup> Aey claimed Feathers bit him, Feathers claimed Aey bit his own finger.

<sup>85</sup> Feathers was a carpenter.

**DISCUSSION:** Evaluating Feathers' claims "under the framework of qualified immunity," the Court found that the officers' initial actions were inappropriate in as much as they were based upon an anonymous tip, but also found that it was a "dispatcher case," finding that the officers had no way of knowing that the information relayed by the dispatcher was based upon an anonymous tip. However, the Court found that the knowledge of the dispatcher must be imputed to the officers, and that they all "lacked sufficient information to support a finding of reasonable suspicion." The Court agreed that "when an anonymous tip is neither supported with indicia of reliability nor corroborated with police observation, it cannot provide an officer reasonable suspicion for a Terry stop." The Court noted that it was dispatcher, not the caller, which "suggested that Feathers might be carrying a weapon." They also stated that prior to detaining Feathers, the officers had observed only three facts: that Feathers was with a woman, on a porch and had his hands in his pockets.

However, the Court found the officers did respond in a reasonable manner, based upon what they knew at the time, because the officers had "sufficient factual basis for thinking that they were acting consistently with Terry." The Court found the officers' use of force to be appropriate when applied against Feathers' actions, and that they had reason to believe he was attempting to flee, but that they did not need probable cause, because there was

no arrest at that time. By the time the arrest was actually made, the officers had probable cause for the assault charge, because Aey's finger had been bitten.

**U.S. v. Copeland**  
**321 F.3d 582 (6<sup>th</sup> Cir., Mich. 2003)**

**FACTS:** On June 30, 1999, Michigan State Troopers Weber and Gillett, spotted a vehicle with its parking lights on, parked on the wrong side of the road, at an angle. They approached, intending to issue a parking citation. Before they could do so, however, the vehicle drove off and merged into traffic. The officers followed for a short distance until they were positioned behind the suspect vehicle, and then turned on their emergency lights. The vehicle stopped.

The officers smelled alcohol in the vehicle, and they saw alcohol in plain view.<sup>86</sup> The arrested the driver, Hartwell, and searched the occupants and the vehicle. They found two stolen firearms and a sheet "containing drug tabulations." They then also charged Copeland, apparently a passenger, for alcohol offenses.

Both defendants moved to suppress the evidence found in the vehicle, asserting that the stop and the search were unreasonable. Their suppression motion on this point was denied.

**ISSUE:** May a traffic stop be made for a parking violation?

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<sup>86</sup> Michigan has an "open container" law.

**HOLDING:** Yes

**DISCUSSION:** The defendants argued that a *traffic* stop for a *parking* violation was unreasonable. The Court agreed that the issue was one of “first impression” for the Circuit. Looking back to Whren,<sup>87</sup> the Court found that under Michigan’s law, “an antecedent parking violation can conceivably form the basis for probable cause to stop a vehicle.” The Court stated that the stop must take place within a reasonable time, but that the period of time (and distance) was acceptable in this situation.<sup>88</sup>

Because the stop was reasonable, the officers’ observations made during the traffic stop were also legal – as were the arrests based upon those observations. With that, they were permitted to search the vehicle, and the items found during that search were also admissible.

**U.S. v. Pinson**  
**321 F.3d 558 (6<sup>th</sup> Cir., Tenn. 2003)**

**FACTS:** On August 19, 1999, Officer Mackall, Nashville Metro police, applied for a search warrant to search a particular home for drugs and other items.<sup>89</sup> The warrant was signed by a magistrate judge.

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<sup>87</sup> Whren v. U.S., 517 U.S. 806 (1996).

<sup>88</sup> The trial court did hold the stop to be reasonable, but based it instead on moving violations, the apparent driving on the wrong side of the road and obstructing traffic that they presumed must have occurred.

<sup>89</sup> The opinion reprinted the entire affidavit. It read as follows:

Officer Mackall, along with other officers, went to the home in an unmarked van. A marked vehicle may have also been present. They rapidly approached the house, which was set back perhaps 15 feet from the street. When the officers arrived, a woman was standing on the front porch. On their orders, she went

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*This affidavit is made by Officer William Mackall who has 6 years of law enforcement experience as a sworn police officer and 4 years as a narcotics investigator, now testifies herein which is based upon information received from other law enforcement officers, unless otherwise stated, which your affiant believes to be true, and is as follows. Within the last 72 hours your affiant searched a reliable confidential informant hereafter referred to as "CI" and found no illegal contraband and directed said CI to go to stated address and purchase a quantity of cocaine which said CI did. Your affiant gave said CI some pre-photo copied buy money and observed said CI enter through the front door of stated address and momentarily returned through the same door. Said CI then walked directly \*561 back to my vehicle turning over a large yellowish rock that later field tested positive for cocaine base. Said CI is familiar with said drug from past experience and exposure. Your affiant knows said CI is reliable from past information received from said CI resulting in the lawful recovery of narcotics. Your affiant will only give said CI's name to the judge signing this warrant. The CI wishes to remain anonymous for fear of reprisal. Your affiant wishes to search each person(s) on the above premises[.] From your Affiant's experience and training, he has learned that most persons present at premises; where controlled substances are bought, sold and/or used, have controlled substances, paraphernalia, weapons or other evidence of criminal conduct secreted on their person.*

down to the ground and was handcuffed.

At the door, the officers knocked and announced their presence. The CI in the warrant had told Mackall that the residents would not respond to a knock, to purchase drugs one had to call first. After five to ten seconds, they battered the metal security door; they also had to use the battering ram on an interior door. In the living room, they discovered two women, and Pinson in the door of a bedroom. The search yielded crack and power cocaine, Dilaudid, Valium, marijuana, scales and guns.

Pinson was indicted. He requested suppression based on his assertion that the warrant did not satisfy probable cause, and that the officers violated the “knock and announce” rule.

**ISSUE:** 1) Must a warrant name the individual from whom a CI buys drugs, to be valid?

2) Does a three day lapse between the last buy and the execution of a warrant make it stale?

3) Is there a specific time period needed for the “knock and announce” rule?

**HOLDING:** 1) No  
2) No  
3) No

**DISCUSSION:** The Court first considered the sufficiency of the search warrant affidavit. Pinson

alleged that the affidavit was “bare bones” and inadequate. The Court contrasted the warrant with the one considered in Allen,<sup>90</sup> and found that, despite Pinson’s assertion, the warrant was sufficient. The Court discounted the assertion that since the affidavit did not name or describe the person from whom the CI bought drugs, or that the warrant did not name the legal owner of the property, stating that information was not essential to the warrant.

Pinson also contended that the warrant was “stale” because of the time lag between the information and the warrant. There was approximately a three day lapse between the drug buy and the execution of the warrant. The Court indicated that while the passage of time might be important in particular cases, it wasn’t controlling.

With regards to the “knock and announce” rule, the Court found that there was no specific time period that must be applied. Various courts have agreed that fifteen seconds is sufficient, and at least one court have agreed that as few as five seconds may be sufficient, especially when drugs are concerned, because officers “can reasonably assume persons with access to working plumbing facilities will try to destroy this evidence.” The Court also agreed that knowledge about the dangerousness of the inhabitants may also be important, as well as the time of day – the Court pointed out that a longer time may be necessary at night, when the inhabitants are likely asleep. The Court specifically

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<sup>90</sup> U.S. v. Allen, 211 F.3d 970 (6<sup>th</sup> Cir. 2000.)

pointed to the events that occurred prior to the knock, and stated that those events could reasonably have alerted the inhabitants – and that when they entered individuals inside were literally within arms’ reach of the officers, yet had not opened the door.

The Court upheld the denial of the suppression motion.

**U.S. v. Layne**  
**324 F.3d 464 (6<sup>th</sup> Cir. Tenn., 2003)**

**FACTS:** On February 21, 2001, Chattanooga officers and DEA agents executed a search warrant on William Dick’s apartment in Chattanooga. When they arrived, they found Layne and Ritchie. Ritchie was found to have ephedrine in his pants, and Layne had methamphetamine in her mouth. Dick arrived during the search.

The search revealed that they had been cooking methamphetamine by the ephedrine reduction method. During the search, the officers recovered several flammable and toxic chemicals used in the cooking process. The lab had been operating for at least two weeks, and the apartment was located in a “densely settled area.” At the time of the search, the cook was at the stage when “toxic, carcinogenic phosphine or phosgene gas is produced....”

All three were eventually convicted. They were given a sentence enhanced by the danger of the operation of the meth lab.

**ISSUE:** May a meth lab conviction be penalty-enhanced because it presents a serious hazard to others?

**HOLDING:** Yes

**DISCUSSION:** Federal law in this area intended to address the “methamphetamine epidemic in America.” Congressional hearings “explained the hazards associated with the ‘dangerous manufacturing process’ for methamphetamine and discussed the factors to be used in determining if there is a “substantial risk of harm,” involved in a lab, which included the chemicals and how they were stored, the manner of disposal and the location of the lab in the community. The evidence found included chemicals, red phosphorus, acetone and crystal iodine, that were highly flammable and potentially explosive. Neighbors reported smelling the acetone fumes, which indicated that they were subject to an inhalation risk.

**Bukowski v. City of Akron**  
**326 F.3d 702 (6<sup>th</sup> Cir., Ohio, 2003)**

**FACTS:** During the time frame of this case, Lisa Bukowski, 19, lived with her parents in Avoca, Pennsylvania. Lisa was mentally disabled but not under any legal guardianship. While the testimony indicated that she had trouble in certain functional areas, she graduated from high school under a special education program and was quite proficient with the computer, regularly engaging in Internet activities. She did not hold a job, but worked regularly as a volunteer.

Prior to May of 1999, Bukowski began chatting online with a 39-year-old man, Leslie Hall. He told her a lie, that he was an 18-year-old disabled male, and encouraged her to visit him in Akron. On May 8, she set out for his home, taking a series of cabs and buses. Sometime after she arrived, he repeatedly raped her.

When her parents realized she was gone, they contacted the local police department. Through investigation, they discovered that she had traveled to Akron. Further investigation through the computer account and AOL led them to Hall's address and by the next day, Avoca police had requested the assistance of Akron police. They listed Lisa as a missing person, and told Akron that her parents were on the way; it would take 8-9 hours for them to drive to Akron.

Akron officers went to Hall's home, and found Lisa there. They convinced her to come to the station with them. There, Officer Urbank assessed her and concluded that while she may be a big "slow," she obviously had some ability to take care of herself because she had made her way to Akron. He knew she met Hall through a chat line, and decided she had demonstrated some ability there, as well. She spoke favorably of Hall, called Hall her boyfriend, and asked to be allowed to call him and go back to his home. She did not indicate that they had had sex or that he had hurt her in anyway way. (They were also apparently unaware of the age difference.) She suggested she left Avoca to escape her parents, and

that they were abusive. A victim's advocate who interviewed her came to the same conclusion as Urbank.

Urbank contacted the agency's legal counsel, Summers, about whether they should hold her at the station. He advised Urbank that they had no legal authority to detain her and that she should be released, if she insisted. The briefly discussed committing her to the Children's Service Board, but decided it was inappropriate considering her age and the lack of any proof as to her disability. She was also not considered a mentally ill person under Ohio law. Urbank offered Bukowski the choice to go to a shelter and stay at the station, not offering Hall's home as an option, but she wanted to go to Hall's home. At 4:30 a.m., some 4-5 hours after she was picked up, she was returned to Hall's home.

When her parents arrived and picked her up from Hall's residence, they learned of the multiple rapes, both before and after her encounter with the Akron police. Her parents filed rape and kidnapping charges against Hall. He was eventually convicted.

They also sued the Akron police and individual defendants. Summers and Urbank were denied summary judgment on the basis of qualified immunity, by the trial court, and appealed.

**ISSUE:** May an agency be held liable in a situation where it does not take action to protect an apparently competent adult?

**HOLDING:** No (without further evidence)

**DISCUSSION:** Referring to the seminal case of DeShaney v. Winnebago County Dep't of Social Servs.,<sup>91</sup> the Court agreed that liability could be based upon the Due Process Clause, when an injury occurs while in state custody (not necessarily arrest). They court also recognized liability when injury occurs from the "affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence."

However, in this case, the "officials arguably did nothing to increase Bukowski's vulnerability to danger." The officers had no knowledge of the dangers facing Bukowski, and the Court held that the officers did not exhibit "deliberate indifference" to any hazards. The Court adopted the definition in Farmer v. Brennan,<sup>92</sup> which required that the official must "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Urbank and Summers took many actions to determine the ability of Lisa Bukowski to make her own decisions, basing their conclusions upon solid facts and personal observations.

The Court noted that that the officers faced serious criminal and civil liability had they done as the Bukowskis desired, which was to

hold Lisa against her will. The Bukowskis argued that Urbank should have "stretched the boundaries" and loosely construed Ohio law, but the Court found that to be too high a standard, and placed Urbank in an impossible situation. However, DeShaney stated that officers "do not have a constitutional obligation to prevent private violence", only to "refrain from actively increasing the individual's susceptibility to" it. The Court found that Urbank and Summers were entitled to qualified immunity.

**Pouillon v. Little**  
**326 F.3d 713 (6<sup>th</sup> Cir. Mich. 2003)**

**FACTS:** For some years, Pouillon regularly stated abortion protest in front of the city hall in Owosso, Michigan. On December 22, 1994, he moved from his usual spot on the sidewalk to the steps of the building. Officers Little and Blanchett arrested Pouillon when he refused to move back onto the sidewalk.

Pouillon sued the officers for false arrest and malicious prosecution, and the city removed the case to federal court, characterizing it as a First Amendment constitutional claim. Pouillon amended his complaint, making specific constitutional claims and requesting compensatory and punitive damages, and attorney's fees.

Before trial, the officers made a formal offer in the amount of \$2,500 and later a formal offer for \$10,001, but Pouillon rejected both. At trial, the jury returned a verdict in favor of the officers. The case was

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<sup>91</sup> 489 U.S. 189 (1989)

<sup>92</sup> 511 U.S. 825 (1994)

appealed and eventually remanded for trial. The jury at a second trial returned a verdict in favor of Pouillon, but only awarded him \$2.00. Pouillon requested attorney's fees, the officers requested fees under Rule 68.<sup>93</sup> The District Court awarded Pouillon \$35,690 in attorney's fees and nothing for the defendants. The defendants appealed.

**ISSUE:** Is a winning plaintiff in a §1983 case automatically entitled to attorney's fees?

**HOLDING:** No

**DISCUSSION:** Normally, the prevailing plaintiff in a lawsuit based upon 42 U.S.C. §1983 is allowed "reasonable attorney's fees." An individual who wins a "nominal judgment" as in this case, may be entitled to fees, but the court stated that the "most critical factor in determining the reasonableness of an attorney's fees award is the degree of success obtained." The Court went on to say that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all." In Farrar v. Hobby, the court found that a "technical vindication of one's constitutional rights alone is not enough to justify an award of

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<sup>93</sup> Federal Rule of Civil Procedure 68 "provides that a party defending against a claim may make a pretrial offer of settlement and if the offeree does not accept within ten days, and 'the judgement finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.'".

attorney's fees pursuant to [42 U.S.C.] §1988. The court found that his technical victory was not enough to justify an award of attorney's fees. While Pouillon argued that was the primary goal of the litigation, to vindicate his rights, the Court found that had that been the case, he would have accepted the formal offers of settlement made.

The court found that Pouillon was responsible for all costs incurred by both sides after the date of the first offer. The case was remanded to determine the amount to be awarded.

**U.S. v. Pennington**  
**328 F.3d 215 (6<sup>th</sup> Cir., Tenn., 2003)**

**FACTS:** Officers in Shelby County, Tennessee, executed a search warrant at Pennington's home. The first officer, Wright, said he knocked loudly, called police, and heard footsteps running away from the door. He waited 8-10 seconds, then pried open the door with a tool. The other four officers who testified stated essentially the same thing. Defense witnesses presented a different picture, claiming the officers did not knock or announce their presence before forcing open the door, but parts of their testimony was contradictory. The Magistrate Judge believed the officers' testimony to be more credible.

**ISSUE:** How much time must pass, after knocking, before an officer may enter on a search warrant?

**HOLDING:** No set time

**DISCUSSION:** The Court examined the factors to be considered in a knock and announce case. Using U.S. v. Spikes,<sup>94</sup> the Court noted that drugs would be a factor, and that drugs often equated with weapons. The time of day is also important, as is the way the “announce” is given. In this case, the officers used a bullhorn. The court found 8-10 seconds to be sufficient notice, and that there was no bright-line rule concerning how many seconds officers must wait before entering. What is important is “how much time it would take for a person in the house to open the door ....”

**Thacker v. City of Columbus**  
**328 F.3d 244 (6<sup>th</sup> Cir, 2003)**

**FACTS:** On September 5, 1998, Jessica Gallagher and her fiancé, Jeffrey Thacker, lived together. That evening, they went out with friends and were driven home, as both were intoxicated. Thacker apparently continued to drink when they arrived home. According to Thacker, he dropped a beer bottle, which broke, and then slipped and fell, cutting his wrist on the glass. Gallagher called 911. The ensuing conversation with the dispatcher was confusing, with the dispatcher understanding her to say that Thacker had cut his wrist intentionally. Because of that, Officers Elias and Stack of the Columbus Police Department were dispatched, along with Columbus paramedics Kaiser and Wentworth, with a high priority radio code that indicated a “cutting or stabbing.” The paramedics arrived first, and waited for police. When Elias and

Stack arrived, they approached the apartment and knocked. When the door opened, they saw the broken glass and a depression in the wall, and saw that Thacker was bleeding profusely from the hand. Thacker was “visibly intoxicated and immediately belligerent,” stating that he had called for paramedics, not police. He invited the EMS personnel in, but not the police, although neither Gallagher or Thacker expressly prohibited the police. The officers entered.

Once inside, they were still unsure how Thacker had been injured, but the officers determined that only Thacker and Gallagher were present and that it was safe for the paramedics to enter. They stayed with the paramedics because Thacker was alternating between belligerence and cooperation. Kaiser determined Thacker needed stitches, but Thacker refused transport.

During this time, Elias saw that Gallagher had a visible bruise on her upper arm, and asked what had happened. The two EMS personnel also saw the bruising, which was on her arm and her legs, and they described it as recent. Gallagher claimed to have been injured when she fell out of bed, but investigation showed that her bed was only a mattress on the floor. She then claimed to have stumbled into a dresser, but later changed the story again, indicating some of the bruises were as a result of a fall on the front steps.

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<sup>94</sup> 158 F.3d 913 (6<sup>th</sup> Cir. 1998)

Stack took Gallagher outside, where she confessed that Thacker had struck her. The paramedics also questioned her, but noted that she appeared apprehensive about talking in front of Thacker. Paramedic Wentworth took her outside to the ambulance and questioned her, and stated that she had told him that “she deserved it – that she and Mr. Thacker had gotten into an argument, that she made him mad, and that he started hitting and kicking her.” He reported this information to Elias.

Elias called for Sgt. Bosley, his supervisor to respond, and explained the situation. Bosley spoke with Thacker, who agreed he had argued with Gallagher, but not that he had struck her. Bosley tried to speak to Gallagher, but Thacker kept interrupting. Bosley took her outside, and upon questioning, reluctantly agreed that Thacker has caused the bruises. Bosley directed Elias and Stack to arrest Thacker for domestic violence, which they did. The photographed the bruises.

In court, Gallagher claimed that she had told no one that Thacker had struck her. She and Thacker stated that the officers cursed and threatened her with arrest if she did not cooperate. She also claims the officers handcuffed her briefly while taking the photographs, but the officers and the paramedics denied this.

Eventually the charges against Thacker were dismissed because Gallagher refused to cooperate. Thacker and Gallagher sued for

federal claims of an unlawful entry (in the apartment) and for an unlawful seizure (for the arrest and the handcuffing) and related state law claims. The trial court granted the defendants summary judgment and dismissed the claims. The plaintiffs appealed.

**ISSUE:** May officers and EMS personnel enter a home pursuant to a 911 call for assistance, particularly when their own observations indicate there is a problem?

**HOLDING:** Yes

**DISCUSSION:** The Court found it to be undisputed that the officers and paramedics “entered plaintiffs’ home without a warrant in response to a 911 call.” The defendants contended they had to enter to determine if anyone was in danger or immediate need of assistance. The Court agreed that the call, and the circumstances the officers discovered upon arrival, were sufficient to justify the entry. The uncertainty of the situation, and the need to protect the paramedics, created exigent circumstances, since the cause for Thacker’s injury was not sufficiently explained. The court also found that the officers’ observations also justified Thacker’s arrest, considering the scene as they found it and Gallagher’s “oft-changing story,” combined with Ohio’s preferred arrest policy for domestic abuse.

The Court also found that since Gallagher could not identify which of the officers present had allegedly handcuffed her, those claims must

also be dismissed. The Court also found that qualified immunity was appropriate for all of the defendants on all claims.

**U.S. v. Loney**  
**331 F.3d 516 (6<sup>th</sup> Cir., 2003)**

**FACTS:** On August 1, 1998, Corey Loney was paroled. He signed a form agreeing to the terms and conditions of his release, which included a prohibition on the possession of firearms, ammunition and drugs, and agreeing to drug testing. He also agreed to searches without a warrant by probation officers, particularly Officer Dystra, his assigned probation officer, whenever Dystra had reasonable grounds to believe he was not abiding by the conditions.

After his release, Loney failed several tests, showing a positive result for marijuana. He was ordered to complete a substance abuse counseling program, but he continued to use marijuana and cocaine. When he failed to report as ordered to his probation officers in November, he was again incarcerated, serving 92 days. Once again he was released, and despite a counseling assignment, once again he began to fail drug testing, and by July, he again failed to meet as ordered with Dystra. Dystra issued a local arrest order for his violations.

Periodically, Dykstra would make an effort to locate Loney, and would randomly drive by Loney's mother's home, and would call that home. On January 9, 2001, Dykstra called the home, and Loney answered. Officer

Dykstra assembled several other parole officers and went to the home to arrest Loney. After confirming Loney's presence again, by phone, Dykstra approached the home and knocked. Loney's mother answered the door, and Dykstra saw Loney inside, in a t-shirt and underwear. As Dykstra moved inside, Loney headed to the top of the basement steps. Dykstra told him to stop, but Loney continued down, saying he needed to dress. Dykstra repeated the order, and Loney finally came back up, in the same clothing. He was arrested, allowed to dress and taken outside. The parole officers then searched Loney's bedroom, finding marijuana and ammunition, and searched the basement, finding a loaded AK-47 rifle.

Loney was sentenced to 119 days for the violations. Later that year, Loney was indicted under federal law for the weapons.

**ISSUE:** May a probation officer search a residence where a probationer (who has allegedly violated terms of their probation) is living?

**HOLDING:** Yes

**DISCUSSION:** The Court examined the case under the "special needs" exception, delineated in Griffin v. Wisconsin.<sup>95</sup> This inquiry requires a two-pronged examination: does the regulation or statute under which the search is made satisfy the Fourth Amendment's reasonableness requirement, and whether the facts of the particular case satisfy it as

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<sup>95</sup> 483 U.S. 868 (1987)

well. In this case, Dykstra had sufficient cause to believe Loney was violating the terms of his parole. Dykstra and his fellow officers performed the search with no assistance from local officers. The Court also found sufficient cause to search both the bedroom and the basement, given Loney's specific actions on the day of the arrest.

**Clifford v. Chandler**  
**333 F.3d 724 (6<sup>th</sup> Cir. Ky., 2003)**

**FACTS:** On May 20, 1996, Det. Birkenhauer of the Northern Kentucky Drug Strike Force set up a meeting with Gary Vanover, at Vanover's apartment. The purpose of the meeting was to obtain crack from a friend of Vanover, Charles Clifford. He did, in fact, negotiate a transaction with Clifford. Clifford delivered a small amount of crack, with a promise of more later in the day. However, when Birkenhauer returned to the apartment, no one was home.

During the transaction, Birkenhauer wore a wire, allowing another officer, Darrin Smith, to listen from a remote location. Smith testified that he heard 4 different voices, identifying Birkenhauer's voice and one of the female. Of the other two voices, he identified both as male, and one as "black." Clifford is an African-American and Vanover is White. The actual audiotape was ruled inaudible and was not admitted as evidence.

At the trial, Vanover stated that the crack was his, that he made the sale, and that he was the person that

promised to obtain more, and that Clifford and Birkenhauer did not discuss a drug transaction. However, Clifford was convicted of trafficking. Clifford appealed based upon a number of arguments, but this summary will discuss only the argument that the voice identification, related to the race of the speaker, was inadmissible.

**ISSUE:** May evidence be introduced concerning the "race" of a speaker, using solely the speaker's voice?

**HOLDING:** Yes

**DISCUSSION:** The Court found that "research conducted on the issue of racial voice identification indicates this type of identification is extremely reliable," citing a study to that effect. The Court also stated that a "vast majority" of courts that have dealt with the issue have admitted such evidence. Finally, the Court agreed that such evidence was not automatically prejudicial, especially since the officer testifying did not even say specifically that the voice he heard was Clifford's.

**U.S. v. Jones**  
**335 F.3d 527 (6<sup>th</sup> Cir. Tenn., 2003)**

**FACTS:** Sometime prior to August 9, 2000, federal and state law enforcement members of a joint task force in Knoxville learned that Jones was wanted on a federal warrant. On that date, members of the task force pulled Jones over, in his vehicle, and arrested him. They asked for permission to search his residence, and he refused. He was then taken to the station and booked.

Because of surveillance conducted before the arrest, the team knew that two other individuals were at Jones' house. They had seen a male working on a vehicle in the driveway and another person taking care of the dogs. FBI Agent Fisher went to the house with other officers, ostensibly to determine the identity of the men. (He stated that had the men refused to speak to them, he would have left.)

Officer Gilreath, Knoxville P.D., knocked at the door, while Agent Fisher watched for the dogs. Teasley answered the door. He gave his name and stated his purpose for being there, to "clean up the house." He admitted them inside the door of the residence. Another man was inside, he gave his name as Dickason; he was the one working on the car. He was asked about his relationship to Jones, but the opinion doesn't give the response.

Dickason told Gilreath his ID was in a duffel bag in a back bedroom, and Gilreath asked for permission to look for it. Dickason agreed. When Gilreath entered the room, he saw several firearms in plain view, and found a crack pipe in the duffel bag.

The officers secured the residence and sought a search warrant. Fisher specifically stated in the warrant that Jones had refused consent. Jones was eventually charged on firearms and drug charges. He was convicted, and appealed.

**ISSUE:** May an employee consent to the search of a residence, despite

the explicit refusal of consent by the owner?

**HOLDING:** No

**DISCUSSION:** Jones argued that neither Teasley nor Dickason, who had "lesser possessory rights to the premises ... could give lawful consent to the officers to enter the premises."

The court noted that while Dickason was apparently an overnight guest, Teasley was never indicated in the record as being more than a handyman. The appellate court looked upon him as a employee. The Court found that "[w]hen the primary occupant has denied permission to enter and conduct a search, his employee does not have the authority to override that denial."<sup>96</sup> In this situation, the officers knew that Teasley was "simply a handyman," and combined with Jones' denial, it was "impossible for a 'man of reasonable caution' to believe that Teasley had the authority to consent to a search of the residence, or even to permit entry.

**Cartwright v. City of Marine City**  
**336 F.3d 487 (6<sup>th</sup> Cir. Mich. 2003)**

**FACTS:** At about midnight, on October 27, 1998, Terry Cartwright was walking on the "foggy, unlit shoulder" of a road in St. Clair County, Michigan. Officers Vandermeulen and Rock, of Marine City, came upon him as they were going to pick up a prisoner at a

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<sup>96</sup> The court agreed that the situation would be different if the parties had an equal interest in the property, such as spouses or cotenants.

nearby convenience store. The stopped and asked his destination, and offered him a ride to Port Huron. Cartwright agreed and they continued on to the location of the pickup.

During the trip, they asked him for ID, which he produced. The officers smelled an alcoholic beverage on him, but noticed no signs of intoxication.

At the store, they took custody of the prisoner, and told Cartwright that to allow him to ride in the back, with the prisoner, they would need to pat him down. He refused, and they left him at the convenience store.

Shortly afterward, the clerk, Beaufait, reported that Cartwright entered, bought a soft drink and left. A half hour or so later he came in and tried to buy a beer, but the clerk refused, because he appeared "haggard and confused, and slurred his speech." Instead he gave him a cup of coffee, and Cartwright remained in the store some 20-30 minutes, drinking the coffee and talking to the clerk. He then left.

About 2:25 a.m., Cartwright was struck and killed by a truck; apparently he was lying in the roadway. He was about two miles from the convenience store. At the time of his death, his blood alcohol was .27, and a forensic pathologist estimated his blood alcohol was about .30 when the officers had contact with him. He should have been showing obvious signs of intoxication at that time.

Cartwright's wife sued on behalf of his estate, claiming that the officers and the city violated Cartwright's substantive due process rights under 42 U.S.C. §1983. The officers and the city requested summary judgment, and the District Court denied their request. They then appealed.

**ISSUE:** Must officers protect an intoxicated subject, who appears to be competent?

**HOLDING:** No

**DISCUSSION:** Under DeShaney v. Winnebago County Dep't of Soc. Servs.,<sup>97</sup> failing to protect an individual against private violence is not a constitutional claim. An exception exists when the person suffers injuries "either while in state custody or because of state acts that made him more vulnerable to private violence." This is referred to as a "special relationship" between the individual and specified government officials.

However, the Court has determined that custody occurs "when the state restrains an individual," which did not occur in this case. The officers were not responsible for Cartwright's inebriated state.

However, the plaintiff argued that in light of a Michigan law that requires that incapacitated individual must be taken into protective custody, the officers should be liable. However, the Court reiterated, pursuant to Jones v. Union County,

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<sup>97</sup> Supra

Tennessee,<sup>98</sup> that “violation of a state statute does not create a liberty interest or property right under the Due Process Clause.”

In the alternative, the court found no state-created danger or affirmative acts on the part of the officers. At most, they “failed to act.” In fact, they took the plaintiff from a dangerous place and transported him to a safer location at the convenience store.

The Court also referred back to their recent decision in Bukowski<sup>99</sup>, where the officers were faced with “unavoidable liability.” The Court noted that these officers were faced with a “similar Catch-22,” had they decided to take Cartwright into custody improperly.<sup>100</sup> They could not subject him to a patdown search and they could not allow him in the back seat with a prisoner absent that search. The Court stated that “[a]n officers’s decision to stop and pick up a citizen walking along a dark highway should not result in liability ....”

The Court found that the officers were entitled to qualified immunity, and that the City could only be held liable if there was a showing of liability on the part of its officials.

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<sup>98</sup> 296 F.3d 417 (6<sup>th</sup> Cir. 2002) summarized in 2001-02 Legal Update.

<sup>99</sup> See summary earlier in this update.

<sup>100</sup> Like Kentucky, just being intoxicated in not, in and of itself, a criminal offense.

### **Adams v. City of Auburn Hills** **336 F.3d 515 (6<sup>th</sup> Cir. Mich., 2003)**

**FACTS:** On March 8, 1999, Adams rented a room at a motel in Auburn Hills, with an old girlfriend. He was driving a vehicle that he was purchasing from another ex-girlfriend, Breckinridge.

However, apparently Breckinridge was not happy about Adams being at the motel with another woman, because when she found the vehicle in the early morning hours, she smashed the window of the room in front of where the car was parked. However, it was not Adams’ room, and he prudently stayed inside his own room, upon hearing the commotion.

Officers Heath and Martin arrived in response to the call. They found Breckinridge in the car, and she admitted breaking the window. She admitted why she was there, and stated she wanted the car keys. She admitted that she had permitted Adams to drive the car while he was buying it.

She was arrested. Officer Backstrom arrived, but Heath, the sergeant, told him he wasn’t needed. However, as he left, he was detained by another guest for a few minutes.

A short time later, Heath saw Adams attempting to leave in the vehicle, and he yelled to Backstrom, who was across the lot, to stop him and get the keys.

According to Adams, Backstrom walked in front of the vehicle with

gun drawn and one hand up for him to stop. Adams did so, and stepped out of the vehicle, standing inside the doorway with his hand on the top of the door. He asked Backstrom if he'd broken any laws, and Backstrom replied he had not; Adams stated that he was leaving. Backstrom yelled for him to get out of the car three times and held his gun near the door. When Adams did not respond, Adams claimed Backstrom put two bullets in the driver's side door, and that as he drove away, Backstrom fired two more shots at the car.<sup>101</sup>

Adams drove to his mother's home nearby, in Pontiac. Pontiac officers found the vehicle. When they approached the back door of the home, Adams ran out the front door. His mother, Bobbie, told officers she had not seen him and refused to allow them to search. Officers watched the house for some time. Eventually, she did allow them to search, and they found a jacket Adams had been wearing at the motel. The impounded the car and eventually Adams surrendered. He was charged with driving on a suspended license and convicted, but the jury did not convict him of the assault charge placed against him, for allegedly attempting to run down Backstrom.

Adams and his mother sued for constitutional violations. The defendant officers requested summary judgment, and granted it for all officers except Backstrom. Backstrom appealed.

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<sup>101</sup>No bullet holes were found in the side of the car, only in the wheel and the mud flap.

**ISSUE:** Is shooting at a moving car a constitutional violation (an impermissible seizure)?

**HOLDING:** No

**DISCUSSION:** Adams argued that Backstrom seized him by shooting at him, in violation of his Fourth Amendment rights. He stated that since he "was unarmed and Officer Backstrom was not in the path of the Taurus," that "it was not objectively reasonable for Officer Backstrom to shoot at him." Backstrom stated that he was shooting at the tire in an attempt to disable it, and that was a "reasonable application of force" under the circumstances.

In Cameron v. City of Pontiac,<sup>102</sup> the court "specifically has held that shooting at a fleeing felon, but missing is not a 'seizure.'" Court of other circuits have found the same. The Court found that the question of qualified immunity was moot, because Backstrom did not commit any action that could be classified as a constitutional violation.

**U.S. v. Ware**  
**338 F.3d 476 (6<sup>th</sup> Cir. Ky., 2003)**

***This case is an appeal from the U.S. District Court case by the same name, reported in the Command Decisions Legal Update 2001-02. As such only the facts of relevance in this appeal are reported.***

**APPELLATE REVIEW:** After Ware was arrested, he was taken to the police station for interrogation and

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<sup>102</sup> 813 F.2d 782 (6<sup>th</sup> Cir. 1987)

booking. He was seated in an interview room and again advised of his Miranda rights. He concluded he would like to have an attorney present, and the officers assisted Ware in locating a particular attorney's name, ultimately deciding that he wanted attorney Stephen Miller. Det. Nunn left the room and tried to contact Miller, with no luck. While Nunn was out of the room, Ware and Det. Pitcock chatted about a variety of things. When Nunn returned, Ware decided he would talk to them, and their discussion (recorded) indicated he understood his right to stop the interrogation at any time.

The District Court suppressed the statements, "premised on the notion that the officer's interrogation of Ware did not cease when he requested counsel, that his statements were given in the same custodial interrogation as defendant's initial request for counsel, and that defendant did not sufficiently initiate discussion of the crime or waive his right to counsel."

The appellate court, however, concluded that in fact, interrogation never began prior to Ware requesting counsel. The questions were related to the Miranda rights, or were routine booking questions. The questions asked were "not even tangentially related to criminal activity ...." The Court held that Ware properly initiated a request to talk further with the detectives, and it was clear from the recorded conversation that he clearly understood he could stop the questioning at any time.

In addition, the Court ruled that the warrant, which was initially suppressed, while "technically deficient as an anticipatory warrant" was sufficient to apply the good faith exception. The Court referred back to U.S. v. Miggins (in this summary) as well, and is consistent with the holding in that case.

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## UNPUBLISHED CASES

***NOTE: Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit.***

### **U.S. v. Richardson**

**40 Fed.Appx. 7 (6<sup>th</sup> Cir. Tenn., 2002)**

**FACTS:** Around the end of June, 1999, a confidential informant told Deputy Beasley, of the Shelby County, Tennessee, Sheriff's Office, that he "had ordered two ounces of 'crack' cocaine" from Richardson. The CI identified Richardson from photos and also identified a residence. This informant had previously been reliable. Dep. Beasley set up a visual surveillance of the residence. Dep. Beasley also told the informant to call him when Richardson called about the sale and when Richard was to leave the residence to make the delivery.

On July 7, 1999, the call came through. The original plan was to arrest Richardson when he was en route to deliver the drugs. However, this plan was abandoned when Richardson approached the surveillance vehicle. Although the windows were tinted, the deputy, who was wearing a marked jacket, was concerned that Richardson had realized what was happening. Other members of the team, who were nearby, elected to rush in and seize Richardson at that time.

The deputies put Richardson on the pavement, handcuffed him and frisked him. He was not given his Miranda rights, nor was he questioned. Deputies used a drug dog to go over Richardson's vehicle, and the dog gave a positive alert near the driver's seat. A search "yielded keys, currency and a plastic bag containing a hard substance." A deputy concluded that it likely contained crack cocaine. Richardson was then arrested and given his Miranda rights.

The team was concerned that Richardson might "return to the house and destroy evidence," or that persons inside the residence might do so. They asked Richardson if others were in the house, and he confirmed that to be the case. They asked Richardson if they could search the house, and he stated that he was a nonresident and could not give permission. Deputies went to the house and knocked, but got no answer. They used the keys found in Richardson's vehicle to enter, and found Latanya Watson, Richardson's girlfriend, inside. She gave written permission to search.

Inside the house, the deputies found "fifty-nine 'rocks' of cocaine, a portion of a slab of cocaine, \$11,836 in United States currency, and a bulletproof vest." During the same time frame, Richardson was escorted into the house, and he volunteered that all of the "drugs and stuff" belonged to him.

Richardson requested suppression of the evidence based on several issues. He contended that the

deputies threatened and forced him to make statements, and that they did not advise him of his Miranda rights. He also challenges his seizure and the evidence taken from his vehicle and his girlfriend's house, because they had not obtained a warrant. The District Court denied these requests, and Richardson appealed.

**ISSUE:** 1) May an informant with a "modest track record" be sufficient to establish probable cause for a warrant?

2) May a vehicle be searched incident to arrest, once the defendant is under control and handcuffed?

3) May a defendant challenge the search of a residence in which they have no expectation of privacy?

**HOLDING:** 1) Yes  
2) Yes  
3) No

**DISCUSSION:** The Court dismissed the allegations of force with little discussion, finding no evidence whatsoever to support Richardson's claims in this regard.

As for the seizure, the Court found that despite the "modest track record" of the informant, that the deputies did have sufficient cause to seize and search Richardson for the cocaine. Once the arrest was made, the Court found that the Sixth Circuit, at least, had found previously that "where there is a lawful arrest, arresting officers can search the vehicle, even if the defendant is

handcuffed." Finally, the Court dismissed the issue of the search of Watson's residence, since Watson did give consent and Richardson, by implication, as a nonresident, had no expectation of privacy in the residence.

**DePalma v. Metropolitan Government of Nashville**  
**40 Fed.Appx. 187 (6<sup>th</sup> Cir. Tenn., 2002)**

**FACTS:** On April 14, 1997, Connie Neal called 911 for assistance. The day before, Neal and her husband, Antonio Neal, were having marital problems, and she had left with her children. She stayed the night with friends in Mt. Juliet, and the next day, went to her parents' home in Hermitage, Tennessee. Neal had left her older child, Deidre, in Mt. Juliet, but brought her younger child, Devonte, with her to Hermitage.

Shortly after their arrival, at 10:09 a.m., Nashville Metropolitan Police Dispatch received a 911 call. The dispatchers heard a male and female voice arguing, then screaming, then two gunshots, before the line went dead. The dispatcher, Davis, had the address and telephone number of the originating residence through the CAD<sup>103</sup> system and initiated an incident call, classifying the call as a 10-41P – a "domestic disturbance in progress." Davis claimed she did not hear the screams and the gunshots.

Officers Helton and Murphy, Nashville Metro Police Department, were dispatched. Believing the call

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<sup>103</sup> Computer-Aided Dispatch system

to be a routine domestic disturbance, they did not use their siren or speed to the location. During that time, Davis called the residence, reaching a female later identified as Connie Neal, to tell her the police were en route. Neal's responses<sup>104</sup> were not responsive to Davis' questions.

Helton arrived first. He knocked at the exterior door twice, but did not receive a response. He stepped inside the foyer and saw Antonio Neal. He asked Neal if everything was OK, and if he had called the police. Neal replied that "no one had called the police" and that "everything was fine." Neal's hands were behind his back, and Helton requested that he bring his hands out, but Neal did not respond to that request. At that time, Connie Neal, holding a baby, appeared, and she also denied having called the police. Looking into the adjacent room, Helton saw the "torso of a body, with a blood-like substance coming from the mouth," but he could not determine if it was real. Realizing that he was in an "extremely dangerous position," Helton began to back out, and also asked Neal to step outside with him. Neal refused. Helton then left the house to radio Murphy to "hurry up."

When Murphy arrived, Helton explained the situation. Officer Sage also responded, and was briefed. Helton asked the dispatcher to call the house back, to try to get more specific information about the problem. Another dispatcher, Wheeler, called the house, and told

Neal that the police were outside. According to Wheeler, she "established that 'everything [was] not all right,' inside the house." Wheeler told the officers that Neal could not talk freely and that she had "pretended that the dispatcher was her employer during the conversation."

Realizing the danger to Neal, the officers approached the house. As they were about to enter, they heard between six and twelve gunshots. The immediately radioed, "shots fired" and requested more help, including SWAT and hostage negotiators. Eventually the SWAT team entered and found the bodies of Connie Neal, her mother, Sandra DePalma, and her brother and sister-law, Tammy and Kenneth DePalma, inside the residence. Her ten month old son, Devonte, was uninjured. Antonio Neal was unconscious, with a bullet wound to the head, and he subsequently died as well.

The Plaintiffs, which included Connie Neal's father, Don and representatives and adoptive parents of Neal's surviving children, sued the various governmental entities for wrongful death under 42 U.S.C. §1983 and for state law claims of negligence, negligence per se and reckless misconduct. During the course of the lawsuit, the two dispatchers and the three officers were dismissed, leaving only the Metro government as defendant in the case.

After discovery, Metro requested summary judgment, stating that it could not be held liable because of

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<sup>104</sup> Both 911 calls were transcribed and included in the opinion.

the “public duty doctrine.” They received a partial summary judgment, which the court finding that the “special duty exception” to the public duty doctrine applied, and the case proceeded to trial.<sup>105</sup>

Metro was found not liable before the jury on the civil rights claims, and the court found that only the two dispatchers were negligent and were thus liable to Neal’s survivors, and returned a verdict of just under one million dollars, however, they held that the government was only responsible for 10% of Neal’s damages, and reduced the award accordingly, resulting in a total award of \$151,000.<sup>106</sup> Both parties appealed, Nashville to reduce the judgment and the plaintiffs to increase the judgment.

**ISSUE:** Do emergency dispatchers have a special duty to callers?

**HOLDING:** Yes, in some circumstances

**DISCUSSION:** The Court found that the children’s separate claims must be disallowed, and that the plaintiffs were entitled to only \$130,000, the maximum Tennessee allowed for such cases.

The Court also discussed the issue of negligence and “the relationship between ‘causation in fact’ and ‘proximate causation.’” The trial

court found that Metro had “breached its duty to act reasonably in answering the 911 emergency call through the failure of its 911 operator Davis and police dispatcher Wheeler to obtain all the necessary information about the seriousness of the situation ...and to pass that information to the police officers who responded ....” The Court found that while they could not state with certainty that the tragic events that ensued would not have occurred had the dispatchers responded differently, that the plaintiffs did prove that the “emergency communication operator’s failure to follow the procedure was a ‘but for’ cause of Connie Neal’s death.” Metro claimed that was simply speculation, but the appellate court found that the trial court’s findings were not clearly erroneous and were supported by the record.

Metro also argued that the “special duty exception” to the general public duty doctrine did not apply. However, the Court found that Tennessee had developed a exception to the usual rule that there is no general duty to protect individual members of the public, stating that the dispatcher’s call-backs and assurances and the officer’s first entries, gave Metro a special duty to assist Neal, “finding that she relied upon the 911 system to provide assistance.”<sup>107</sup>

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<sup>105</sup> In an odd twist, the federal claims were tried before a jury, while the state law claims were tried only to the court.

<sup>106</sup> The court also included separate claims on behalf of Neal’s surviving children in the calculation.

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<sup>107</sup> The case law in Kentucky is essentially the same with regards to finding special duties or relationships in certain situations between the government and specific members of the general public. See [City of Florence, Kentucky v. Chipman](#), 38 S.W.3d 387, Ky., 2001.

**U.S. v. Clark**  
**48 Fed.Appx. 181 (6<sup>th</sup> Cir. Ky., 2002)**

**FACTS:** Officer Charles Adams was sitting in his marked vehicle in Frankfort, Kentucky, near the R & C Sports Bar. At about 2 a.m., he heard a car “rev up,” take off quickly, and drive through the parking lot, which was crowded with other vehicles and persons. He stopped the car as it turned out onto the highway. He gave the driver, Clark, a PBT, which registered below the legal amount needed for alcohol intoxication.

However, it turned out that Clark’s license was suspended, and Adams arrested Clark. He then searched Clark’s vehicle, finding crack cocaine in the ashtray and charged him accordingly. Clark requested suppression of the evidence.

At the hearing Kentucky ABC officer Wells testified that he too had spotted Clark’s behavior in the parking lot, and that he would have stopped the car had Adams not done so. Clark introduced two witnesses to the contrary. The trial court denied the motion to suppress.

**ISSUE:** Are drugs found in the ashtray of a vehicle within a driver’s immediate control?

**HOLDING:** Yes

**DISCUSSION:** The Court found that Adams’ and Wells’ testimony was sufficiently consistent as to be credible and that the initial stop was lawful. The Court also agreed that

the search incident to arrest was also appropriate, and the drugs were found in an area (the ashtray) that was “within Clark’s immediate control” when the stop was made.

**Baskin v. Smith**  
**50 Fed.Appx. 731 (6<sup>th</sup> Cir. Mich., 2002)**

**FACTS:** On October 27, 1996, just after midnight, Ursula Parks and Neicha Patton were arrested by Grand Rapids officers for a disturbance at a local service station/convenience store.

Baskin, who was in the store, stated he observed Officer Smith “handcuff Patton, put her in a choke hold, kick her, strike her with a flashlight three times and slam her head against the door of the police cruiser while trying to place her in the cruiser.” Baskin admitted he openly criticized Smith’s actions. Baskin then claimed that Smith pointed a “container of mace” at Patton, and he again objected. Smith “allegedly told Baskin to mind his own business” and that he wasn’t going to mace her. Baskin claimed another officer actually got Patton into a cruiser.

Then, Baskin alleged, Smith walked over and told him in “vulgar, profane words” to either get in his car or face arrest. Baskin asked for Smith’s badge number and vehicle ID. At some point, Baskin claimed that Smith knocked him into the car door, and that the door shut, and was locked. Smith told him to get in the car again, Baskin replied he could not, because the door was locked,

and Smith then placed him under arrest.

Baskin claimed to have been so tightly cuffed that his wrists bled. He was forced to wait almost an hour outside the jail, and that despite his complaints, his cuffs were never loosened nor did he receive medical attention. Eventually, Baskin was acquitted of disturbing the peace.

Smith claimed his task that night was to provide cover for the arrest and to prevent others from entering the fray. He agreed he struck Patton, using an approved “knee strike” and that he threatened to spray her. Eventually, he claimed, he was able to persuade her to get into the car. Smith claimed that Baskin “interjected himself into the arrest, criticized the officers and demanded their names and badge numbers.” He instructed Baskin to go back to his car, and when he failed to do so, told him he would be arrested. After Patton was confined, Smith said, Baskin again initiated a loud interchange, enough to “entice the crowd,” and that he then arrested Baskin for a violation of an ordinance prohibiting disturbances of the peace.

Smith requested, and was denied, summary judgment on the basis of qualified immunity.

**ISSUE:** 1) May an arrest be made for disorderly conduct only because of speech?  
2) May tight cuffs be considered to be excessive force?

**HOLDING:** 1) Yes, for “fighting words”

2) Yes

**DISCUSSION:** The Court noted, “protected speech cannot serve as the basis for a violation of [municipal] ordinances.”<sup>108</sup> However, the Court agreed that “fighting words” are not protected. But, in the situation as described, the Court did not find that Baskin’s speech consisted of “fighting words,” instead, the Court found it consisted of nothing more than criticism, which is protected.

Next the Court addressed the issue of excessive force, with regard to the tight cuffs. The Court found that the issue of the “overly tight application of handcuffs” as excessive force was clearly established at the time of the case, and that sufficient evidence existed that could support recovery and to uphold the denial of summary judgment.

**U.S. v. Ervin**

**59 Fed.Appx. 631 (6<sup>th</sup> Cir. Tenn. 2003)**

**FACTS:** This case involves three separate searches.

In July, 1999, Deputy Haskell, Madison County, Florida, Sheriff’s Department, observed a vehicle doing 60 in a 70 mph zone. He followed the car, and witnessed it cross the white line into the emergency lane several times. He turned on the camera, and observed

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<sup>108</sup> Quoting Sandul v. Larion, 119 F.3d 1250, 1256 (6<sup>th</sup> Cir. 1997).

the vehicle swerve again. He directed the driver to pull over.

He asked the driver, Yuseff Woodruff, for his license. He produced a total of three – the first two for other people and the third, his own, which proved to be suspended. Haskell testified that his “hands were shaking extremely bad.” Woodruff said that he and his passenger, Ervin, had gotten lost on their way to a concert in Miami, but Ervin reported separately that they were going to Miami for “no special reason.” Woodruff stated that Ervin’s grandfather had rented the car.

Before he was arrested, for driving on a suspended license, Woodruff consented to a vehicle search. The officers found \$25,000 in cash secreted in the car, and it was seized. A patdown of Ervin resulted in another \$2,000, but that was not seized.

On May 19, 2000, the second search occurred. An informant told Chattanooga police that he purchased cocaine from Ervin at an auto shop, and the police arranged for a controlled buy. The informant, Fears, bought a kilo of cocaine from Ervin. The informant reported that he has witnessed another drug buy while he was there, and that there were more drugs on the premises. Officer Dossett went to get a warrant.

While waiting for the warrant, the officers reported seeing two men enter the building and lock the door behind them. They then heard

“people running and yelling inside the shop.” Believing that they needed to secure the premises, the made a forced entry, arrested Ervin, Woodruff and a third man, and did a sweep of the building. Marijuana and cash were in plain view, as was a black bag. The officers waited for the warrant to proceed further.

When Dossett arrived with the warrant, they searched the bag and found about five kilos of cocaine, \$27,000 in cash, more marijuana and cellular phones.

A third search occurred that same evening, of Ervin’s residence, because Fears reported having purchased cocaine at that location as well. Again, cocaine and marijuana were found, along with firearms and ammunition.

Ervin and others were convicted on a variety of charges. Ervin requested the evidence found in the searches be suppressed, but was denied that motion.

**ISSUE:** 1 ) If an officer has a video recording device, must the officer use it during a stop?

2) Is 45 minutes too long for a Terry stop?

3) Will a mistake in a warrant invalidate it?

**HOLDING:** 1) No

2) Not necessarily

3) Not necessarily

**DISCUSSION:** Ervin argued that the evidence from the traffic stop should be suppressed, because Haskell did

not have a valid reason to stop the vehicle. He urged the court to adopt a rule that if an officer has a camera, a means to record, but does not use it, that the “asserted reasons should be presumed to be false.” The Court declined to make such a rule, but did allow that it could be a factor in judging the credibility of the officer.

The Court found no reason to believe that Haskell’s reasons were improper, however, despite Ervin’s assertions that the stop was made only because they were “young black men driving an expensive car.”

Ervin also argued that the stop was unreasonably long – 45 minutes. However, the Court found that there was a “reasonable and articulable suspicion” that criminal activity was occurred, given the facts of the stop. The Court also discounted the patdown, which it deemed appropriate, noting in particular that the money found was not seized.

Finally, Ervin challenged the initial entry into the auto shop, before the warrant was brought to the scene. Even assuming, for argument’s sake, that the initial entry was unlawful, everything found would have been found during the warrant search anyway.

Finally, Ervin pointed to an inaccurate statement in the warrant affidavit, which stated that Ervin owned the auto shop. While that was incorrect, the Court found no evidence that the “statement in question was deliberately, or even

recklessly, false” and as such, upheld the search.<sup>109</sup>

### **U.S. v. Hicks**

**59 Fed. Appx. 703 (6<sup>th</sup> Cir. Ohio, 2003)**

**FACTS:** On February 8, 1998, Hicks purchased a portable cassette player, in Hollywood, California. He removed some parts from inside, creating a place to insert a packet of cocaine. It was not obvious that the player had been tampered with. He then returned it to the box and taped it shut, and packaged it to mail.

He sent the package via Express Mail to David Hill, in Columbus, Ohio. The return address was a residence where Hicks had lived at one time, but the name he placed on the label was not his name, nor had anyone by that name, Mike Hansill, ever lived there. There was also strong evidence to indicate that David Hill did not exist, at least not at the address where the package was sent, and in fact, the person who answered the door to the delivery denied having any knowledge of David Hill.

When the package arrived in Columbus, it came to the attention of Postal Inspector Bogden. He found several things suspicious, including the packaging, the source city, and by checking with the Hollywood post office, that Mike Hansill did not live at the address listed. A further check

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<sup>109</sup> Ervin argued that the trial court should have held a hearing based upon Franks v. Delaware, 438 U.S. 154 (1978), to examine Dossett’s, the affiant’s, veracity. The Court saw no need for the trial court to have done so.

indicated that David Hill did not get mail at the address listed in Columbus. A drug dog did not alert on the package.

Bogden went to the location to investigate. The woman who answered denied that David Hill lived there. She spoke with someone in the apartment, and then stated that Hill was “in the shower.” He asked for ID for Hill. A male voice asked if the package was from California, and to “get it from him,” but Bogden replied he didn’t have the package, but that he just was checking to see if Hill lived there. Again, he was told he did not live there.

Bogden got a search warrant, detailing the above investigation, and searched the package, finding the cocaine. Hicks was arrested for drug trafficking, and eventually pled guilty.

He requested suppression of the evidence, based upon an unlawful search claim, but the trial court found that by using false information, that he “relinquished control over the package,” and did not have standing. The Court found the warrant to be insufficient to establish probable cause, but upheld the search based upon the “good faith”<sup>110</sup> exception.

**ISSUE:** May a person who places a package into the delivery system, particularly with false identification, have standing to object to a search of the package?

**HOLDING:** No

**DISCUSSION:** Hicks had argued

that the warrant could not be awarded “good faith,” because it was a “bare bones” affidavit. Such an affidavit is described as “one that supplies no more than a mere ‘guess that contraband or evidence of a crime would be found.’”<sup>111</sup> However the Court found that the warrant did, in fact, contain sufficient information that a reasonable officer might believe it to be sufficient, notwithstanding the court’s later determination that it was, in fact, not sufficient.

**Jones v. City of Dayton, Ohio**  
**61 Fed. Appx. 183 (6<sup>th</sup> Cir., Ohio, 2003)**

**FACTS:** On an August evening in Dayton, officer were searching for a shooting suspect. They detained a 12-year-old boy who fit the description. Several family members, who were in the vicinity, including the boy’s uncle, Jones, protested.

The officers testified that family members surrounded him and did not comply with orders to step back. Jones “swore at the officers and tried repeatedly to approach his nephew, pushing an officer at one point in an effort to get past him.” Jones, however, said he was peacefully trying to get information when an officer pushed him and tried to force him to the ground, and that he “voluntarily put his hands behind his back to be handcuffed.”

Jones was arrested and charged with several offenses, and he was eventually acquitted. He sued the officers and the city. The defendant

<sup>110</sup> U.S. v. Leon, 468 U.S. 897 (1984).

<sup>111</sup> U.S. v. Schultz, 14 F.3d 1093 (6<sup>th</sup> Cir. 1994)

officers requested summary judgment on the basis of qualified immunity, but were denied.

**ISSUE:** When testimony from opposing parties is dramatically different, may qualified immunity (summary judgment) be awarded?

**HOLDING:** No

**DISCUSSION:** Because of disparity of the testimony, the court found that it was impossible for the court to award qualified immunity at the time. On a procedural note, the officers attempted in the reply brief to argue that even if they dropped all reference to Jones' physical obstruction, that they still had probable cause to arrest him for interference. However, the court stated that it was too late to bring that argument.

**U.S. v. White**  
**68 Fed. Appx. 535 (6<sup>th</sup> Cir., Ohio, 2003)**

**FACTS:** On January 11., 2001, Ohio officers were surveilling a stolen Blazer. When they approached the vehicle, they found it to be unlocked. Deputy Sheriff Amendolar, Stark County Sheriff's Department, entered the vehicle and opened the hood, and disconnected some wires to disable it.

They continued to watch the vehicle. The next day, they watched White try to start the car. They approached and ordered him out of the car, but he continued to try to start it. Finally he got out and fled, but was caught and arrested.

Amendolar found two car keys and a remote in his pocket. One key fit the Blazer, the other fit another stolen car in the parking lot. They also found handguns in both vehicles. He was charged in state court for the stolen vehicles, and charged in federal court for being a convicted felon in possession of firearms.

White claimed he was not in possession of the guns sufficient for conviction. At the trial, the prosecution introduced statements that he made to Amendolar, after he had received Miranda warnings, to the effect that he just "went there to steal a car." Amendolar cautioned him, and he said he would "think about it," and said nothing more at that time.

Three days later, Amendolar approached him again. The deputy reminded him that he had received the Miranda warnings previously. White then made statements implicating himself concerning the weapons. He made a confusing statement concerning the keys and the guns, stating that they should have been in the Blazer. Amendolar testified at trial that he reminded White that the Blazer key was in the ignition, and White requested an attorney. The interview ended.

White was convicted, and appealed.

**ISSUE:** Is a Miranda warning given three days prior to an interview sufficient and still in effect?

**HOLDING:** Yes

**DISCUSSION:** The Court found no reason to suppress White's statements, finding that he was clearly aware of his rights on the day of the arrest and that while there was a three day pause between questioning, there is "no evidence that anything affected [his] understanding of his rights" during the delay. He was questioned by the same officer. He had stopped the questioning the first time, so he clearly understood his right to do so.<sup>112</sup>

The Court also agreed that there was sufficient evidence for a jury to find that White had possession of the guns in both vehicles.

**U.S. v. Lanzar**

**69 Fed. Appx. 224 (6<sup>th</sup> Cir. Tenn., 2003)**

**FACTS:** Logan was observed by deputies engaging in a drug transaction with McGinnis. The deputies stopped his vehicle and searched it, finding methamphetamine, cash and two loaded weapons. Eventually he confessed that Lanzar was his supplier, and that he purchased meth to be resold to his own clients, including McGinnis. He admitted having purchased as much as two pounds at a time, and had detailed records on his sales.

Because of that information, law enforcement officers began to observe Lanzar. Lanzar had

promised to "look after" Logan's wife, Leanne, in exchange for not mentioning Lanzar's name, so deputies set up surveillance at the Logan home, and had a tap on the phone, with Leanne's knowledge. She set up a drug buy with Lanzar, of a substance that later proved to be amphetamine.

Lanzar was arrested, handcuffed and was forced to lie on the ground. He was given Miranda, but not interrogated immediately. Some three hours later he was questioned, initially denying that he sold drugs, but eventually admitting to small transactions.

**ISSUE:** Is a three hour lapse between Miranda and interrogation permissible?

**HOLDING:** Yes

**DISCUSSION:** While agreeing that the circumstances surrounding Lanzar's arrest may have made him nervous, the court came to the "inescapable conclusion that there was no coercive behavior" on the part of the officers and that his statements could be admitted.

**U.S. v. \$188,170.00 in U.S. Currency**  
**69 Fed. Appx. 714 (6<sup>th</sup> Cir. Ohio., 2003)**

**FACTS:** On March 27, 2000, an Ohio trooper stopped Foxworth for speeding on the Ohio Turnpike. The trooper smelled burned marijuana inside the car. He asked about the marijuana, and a passenger gave him a small amount of marijuana.

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<sup>112</sup> White also said he wanted to speak to an attorney, but the Court makes no mention as to whether he did so, or was represented by the time of the second interview.

A second trooper, with a drug dog, arrived. The dog alerted to the trunk, which the troopers examined. They found \$118,170.00 in cash. The trooper seized the currency and turned it over to the DEA, which began forfeiture proceedings. In the hearing process, the court found in favor of the DEA, and Foxworth appealed.

**ISSUE:** Can the smell of marijuana, bolstered by a trained drug dog's alert, be sufficient to warrant a search?

**HOLDING:** Yes

**DISCUSSION:** The Court found the trooper's search of the car to be valid, as it was based upon the trooper's observation of the odor of marijuana, and reinforced by the dog's alert.

As for the forfeiture, the court agreed that previous cases had shown that a trained dog's alert to currency satisfies the probable cause requirement.

The Court upheld the seizure of the money.

**U.S. v. \$99,990.00**

**69 Fed. Appx. 757 (6<sup>th</sup> Cir. Tenn., 2003)**

**FACTS:** DEA agents in Lexington were informed that "young, black, male 'gang-bangers'" were involved in trafficking in the vicinity of a motel, and that they were driving a "silver car with Michigan plates." Agents found a silver Dodge Intrepid located

in the parking lot of the Econo Lodge, matching the description.

Some time later, they saw that vehicle leave the parking lot, but it was being driven by an "older, white, male" who turned out to be Boucher.

They followed him for some distance, watching him make several unexplained traffic movements, making U-turns in parking lots, that they believed indicated he was trying to spot someone following him.<sup>113</sup>

The agents ran a check on the plate, and learned it was a rental, rented by Boucher with an Arizona license. They discovered he had a 1989 felony conviction. He had been registered at the motel for a couple of days, but had requested a move to a room at the back of the motel.

Some eight hours later, the agents returned to the Econo Lodge, intending to do a "knock and talk." The Intrepid was not in the parking lot when they first returned, but arrived while they were investigating another matter. Boucher "was hesitant" to park the car. Agents surrounded the car and asked for ID, and received a Nevada license. They asked his reason for visiting Lexington, and were told he intended to "buy antiques." He explained their investigation and asked to search, and he agreed. The agents found \$4,000 in cash in a shaving kit. Boucher asked them to leave.

At the same time, a drug dog was sniffing the exterior of the Intrepid,

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<sup>113</sup> At trial he claimed he was looking for a place to eat and shop.

and alerted to the driver-side door handle and trunk. Boucher was told this, but refused to give consent for the search. He asked to leave, and was told he could do so, but that he could not take the car. The agents decided they had sufficient information to search the car. Although Boucher objected, he did hand over the keys, so that the car would not be damaged.

The dog alerted to a package, wrapped in duct tape and about the size of a kilogram of contraband. Boucher stated the package was cash, not drugs. Indeed, the package did contain \$99,990 in cash. (Boucher explained it was his life savings, and that he was concerned about Y2K problems.)

The government seized the money, but did not charge Boucher. They did not perform any tests on the package to determine if it was connected with drugs. Boucher was not charged.

**ISSUE:** Is the finding of a large amount of cash, in and of itself, enough to warrant forfeiture of that cash?

**HOLDING:** Yes

**DISCUSSION:** The Court concluded that the information the agents had, including their observation of his erratic driving, was sufficient to warrant a Terry stop. The Court further held that Boucher's consent, which resulted in the finding of the \$4,000, was valid.

The Court further agreed that carrying large sums of cash (the \$99,990) alone was suspicious enough to consider forfeiture. The way the cash was packaged was further cause for suspicion. As such, the Court agreed that the money found in the trunk was subject to forfeiture. However, the Court found that the \$4,000 was not, finding no reason to connect that cash to any illegal activity.

**U.S. v. Magana**  
**70 Fed.Appx. 859 (6<sup>th</sup> Cir. Tenn., 2003)**

**FACTS:** On August 13, 2000, a man, who identified himself as "Andreas Mayer" entered the Franklin Post Office about a package he was expecting, and provided information about a delivery location. The next day, the government (the postal inspector) discovered the package contained over 600 counterfeit Social Security and alien registration cards (green cards). The officers arranged for a controlled delivery of the package to the designated location – the residence of Magana and other individuals. Those present at the apartment at the time of the delivery were arrested, and included a relative of Magana. On August 16, Secret Service Agent Biggers, Postal Inspector Wilson and INS Agent Kinghorn went to the location, and split up upon arrival. They found two Hispanic men and a Caucasian man standing in front of the apartment, one of the Hispanic men matched the description of "Mayer."

Biggers identified himself and asked if any of them lived in the designated apartment, and Magana said that he did. He also identified one of the other individuals present as staying there as well. He produced identification, a driver's license. Magana asked the agent if he knew why one of his relatives had been arrested, and Biggers explained the reason. Magana volunteered that he had visited the relative in jail. He also stated, upon being asked, that he'd been in the post office "about a month before."

About that time, Wilson and Kinghorn arrived. Wilson asked if Magana would go to the post office, and Magana agreed, and asked the reason why. Biggers explained the reason why, and Magana said that it hadn't been him. He was told that if he went to the post office and the clerk didn't recognize him, he would be cleared. All three agents agreed that they told Magana the show-up was voluntary and that he wasn't under arrest.

Magana rode in the front seat of Biggers' car, with Kinghorn in the backseat. Wilson drove separately. Magana was not restrained in any way. Upon arrival, the clerk positively identified Magana as "Andreas Mayer." He was then arrested and given his Miranda rights; he waived those rights and confessed.

Magana is a Mexican national and illegally in the United States. The officers testified their entire conversation was in English, although Kinghorn spoke Spanish.

He appeared fluent in English and spoke with little accent.

Magana requested a suppression of the statement. The trial court held that his waiver at the post office was given "voluntarily, knowingly and intelligently." However, the court suppressed the statements made from the time he was asked to accompany the officers to the post office until the Miranda rights were given at the post office, holding that "a reasonable person would not have believed that he was free to leave." The government asked the court to reconsider, and the court then suppressed all of the statements after he was "seized" at the apartment. The government further appealed.

**ISSUE:** Is both custody and interrogation required for Miranda to apply?

**HOLDING:** Yes

**DISCUSSION:** The court stated that "[a] 'seizure' under the Fourth Amendment does not necessarily comprise the 'custody' necessary to trigger the Miranda doctrine under the Fifth Amendment. The Court further reiterated that "*both*<sup>114</sup> custody and interrogation must exist" for Miranda to apply. The appellate court inferred that the trial court had used the term "seizure" to apply to what it found to be a constructive arrest.

Instead, however, the appellate court found the initial detention, outside the apartment, to be a reasonable

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<sup>114</sup> Emphasis in original.

detention under Terry.<sup>115</sup> Magana matched the specific physical description of the suspect and was outside the suspect apartment. The detention did not “mature into a constructive arrest as it entailed neither an unreasonable length of time nor unreasonable circumstances.” Their questions were tailored to the offense they were investigating. The Court discounted the presence of three presumably armed law enforcement officers, one of whom was an INS agent, in judging whether the detention crossed the line into coercion.<sup>116</sup> The Court found that Magana voluntarily agreed to accompany the agents to the post office, and negated the assertion that because he was a Spanish-speaking alien and presumably unfamiliar with American police practice he was in some way coerced, because of his apparent ability to speak and understand English and his spoken consent.

The appellate court reversed the suppression.

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<sup>115</sup> Terry v. Ohio.

<sup>116</sup> The court mentioned the case of INS v. Delgado, 466 U.S. 210 (1984), which held, implicitly, that INS agents questioning illegal aliens about their citizenship is not sufficient to constitute a seizure.

# U.S. Supreme Court

## Virginia v. Black 123 S.Ct. 1536 (2003)

**FACTS:** On August 22, 1998, Barry Black (the Defendant) led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five or so persons attended the rally, which occurred on private property – the owner was in attendance.

Upon learning of the rally, the sheriff went to observe – parking on the side of the public roadway adjacent to the property. While he was there, a number of cars passed, and a few stopped to ask the sheriff about the rally. A neighbor,<sup>117</sup> Sechrist, also observed the rally, and could hear what they Klan members were saying, which included statements such as “he would love to take a .30/.30 and just random[ly] shoot the blacks.” She testified that the rally frightened her.

At the conclusion of the rally, the crowd gathered around a large cross, which was over 300 yards from the road. According to the sheriff, the cross flamed up, and Amazing Grace was played over the loudspeakers. At that time, the sheriff informed his deputy that they would have to “find out who’s responsible and explain to them that they cannot do this in the State of Virginia.” He entered the property and asked who was responsible, and Black claimed responsibility. He was

arrested for burning the cross, a violation of Virginia law.

At trial, the jury was instructed that it was unlawful to burn a cross with the intent to intimidate persons or groups of persons, and that “the burning of a cross by itself is sufficient evidence from which you may infer the required intent.” The defense objected to that instruction, but the Court allowed it. (This instruction was in accordance with the current version of the statute, and is referred to as the “prima facie provision” in the opinion.) Black was convicted and fined, and the Virginia appellate court upheld the conviction.

In a related case, on May 2, 1998, Richard Elliott and Jonathan O’Mara, attempted to burn a cross in the front yard of James Jubilee, a neighbor of Elliott’s in Virginia Beach. Jubilee had previously complained about someone firing guns on Elliott’s property and the apparent motive for the cross-burning was this complaint. Jubilee found the partially burned cross in his front yard the next morning, and was made “very nervous” about it.

O’Mara pled guilty to attempting to burn the cross, but reserved the right to appeal the constitutionality of the cross-burning statute. Elliott’s trial judge originally ruled that the jury could be instructed as they were in the Black case, but changed the instructions to require that the Commonwealth must prove an intent to intimidate. Elliott was convicted. Both men appealed, and their convictions were upheld.

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<sup>117</sup> The neighbor was a relative of the owner of the property where the rally was held.

The Virginia Supreme Court consolidated the cases and found the statute was unconstitutional on its face, holding it was “analytically indistinguishable” from R.A.V. v. St. Paul.<sup>118</sup> The Court held further that the “prima facie evidence provision renders the statute overbroad because ‘[t]he enhanced probability of prosecution under the statute chills the expression of protected speech.’”

**ISSUE:** Is a prima facie statute stating that cross-burning is automatically an act of intimidation constitutional?

**HOLDING:** No

**DISCUSSION:** The court analyzed the history of cross-burning and noted that “[b]urning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan.” As such, the Court then addressed the history of the various manifestations of the Ku Klux Klan in the United States. The burning of crosses was used both to communicate threats and as “messages of shared ideology” with cross-burning a common occurrences during the taking of loyalty oaths. The first known cross-burning, according to the opinion, that was connected with the Klan took place in 1915, in connection with the lynching of Leo Frank in Georgia.<sup>119</sup> From that point, the

reborn KKK regularly used burning crosses to intimidate, but also used the burning cross as “a sign of celebration and ceremony.” However, the Court agreed that a burning cross was a “symbol of hate.”

The Court stated that “when a cross burning is used to intimidate, few if any messages are more powerful.”

The Court launched into a history of the First Amendment and its protections to speech. The Court reiterated that the protections are “not absolute,” and that the Court had “long recognized that the government may regulate certain categories of expression consistent with the Constitution.” In the past, the Court had found that “fighting words” are proscribable, as are words that constitute a “true threat” of violence. The Court defined that to mean “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals” and equated that to the term “intimidation.”

The Court found that Virginia’s ban on “cross burning with intent to intimidate” was not an unconstitutional proscription of speech. The Court noted that cross burning to intimidate was not

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commuted his death sentence, he was taken from his jail cell and lynched by a mob. The “Knights of Mary Phagan,” as they termed themselves, formed the core of the new Ku Klux Klan. Under a cross burning on Stone Mountain, the men inaugurated the new Klan. In 1986, after a review of the trial, Frank was formally exonerated of the crime.

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<sup>118</sup> 505 U.S. 377 (1992).

<sup>119</sup> Leo Frank, a Jewish male, was convicted of the rape and murder of 13-year-old Mary Phagan, a fellow employee at the National Pencil Factory in Atlanta. When the governor

restricted to race and religion, but had been used to intimidate other individuals as well. The Court noted that in the case of O'Mara and Elliott, it was not clear that there was racial animus.

However, the Court did find that, in the case of Black, the prima facie provision was unconstitutional. The court found that "the prima facie provision permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense." And, even when a defendant does mount a defense, the provision makes it "more likely that the jury will find an intent to intimidate regardless of the particular facts of the case."

The Court found that the same act, burning a cross, "may mean that a person is engaging in constitutionally proscribable intimidation," "[b]ut that same act may mean only that the person is engaged in core political speech." In other words, the Court stated, "the provision chills constitutionally protected political speech because of the possibility that a State will prosecute – and potentially convict – somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect." Further, the Court reiterated "[b]urning a cross at a political rally would almost certainly be protected expression."<sup>120</sup> The court found that "the prima facie provision in this case ignores all of the contextual factors that are necessary to decide whether a particular cross burning is

intended to intimidate," and that "[t]he First Amendment does not permit such a shortcut."

The Court upheld the Virginia Supreme Court's decision to overturn Black's conviction. However, the Court vacated the judgment of the Virginia Supreme Court with respect to Elliott and O'Mara, and remanded that case for further consideration, to determine if the provision is severable from the remainder of the statute.

**Chavez v. Martinez**  
**123 S.Ct. 1994 (2003)**

**FACTS:** On November 28, 1997, Officers Peñ and Salinas, Oxnard, California, Police Department, were investigating narcotics activity. While questioning a man, they heard a bicycle approached on a dark path nearby. They ordered the rider, who was Martinez, to get off the bike, spread his legs and place his hands behind his head, which he did. Salinas patted him down, found a knife, and a fight began.

The trial court heard conflicting statements about what actually occurred next. The officers stated that Martinez took Salinas' gun from his holster and pointed it towards them – Martinez denied this. However, they both agreed that Salinas did yell, "He's got my gun." Peñ then shot Martinez several times, "causing severe injuries that left Martinez permanently blinded and paralyzed from the waist down." He was arrested and EMS was notified.

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<sup>120</sup> Quoting R.A.V. v. St. Paul.

Patrol Supervisor Chavez arrived with EMS and accompanied Martinez to the hospital. He questioned Martinez while he was being treated – the interview “lasted a total of about 10 minutes, over a 45 minute period....” Martinez initially made statements that he didn’t know (the answers), that he was choking and that he was dying. Eventually, he admitted that he took Salinas’ gun and pointed it, and that he used heroin. At one point, he stated he would not continue to talk unless he was treated, although there is no evidence that Chavez prevented his treatment. At no time was he given Miranda warnings.

Martinez was never charged with any crime, and as such, his statements were never used against him. However, he sued under 42 U.S.C. §1983, claiming that his Fifth Amendment rights were violated, the right not to be “compelled in any criminal case to be a witness against himself,” as well as his Fourteenth Amendment to be free from “coercive questioning.”

Chavez claimed qualified immunity, but the District Court found in favor of Martinez. Chavez took an interlocutory appeal to the Ninth Circuit, which upheld the District Court, finding that the right to be free from such questioning was clearly established at the time.

Chavez appealed and was granted certiorari.

**ISSUE:** Is a law enforcement officer subject to liability under 42 U.S.C. §1983 for a coercive interrogation

that does not result in a statement being used in a criminal prosecution?

**HOLDING:** No (under the facts of this case)

**DISCUSSION:** The Court found that “police questioning” did not constitute a “criminal case,” holding that a “‘criminal case’ at the very least requires the initiation of legal proceedings.” The Court stated that “[t]he text of the Self-Incrimination Clause simply cannot support the Ninth Circuit’s view that the mere use of compulsive questioning without more, violates the Constitution.”

The Court noted that it has long been the case that the government has been permitted to compel persons to give incriminating testimony, so long as that evidence was not used against them in a criminal case. The Court found little difference between Martinez and a witness who might be forced to testify on pain of contempt. The Court agreed that they had already concluded “those subjected to coercive police interrogations have an *automatic*<sup>121</sup> protection from the use of their involuntary statements ... in any subsequent criminal trial.” As such, the Court found there to be no Fifth Amendment violation.

With regards to the Fourteenth Amendment claim, the Court stated that previously, the Court had overturned convictions based upon evidence obtained by methods that are brutal and conscience-shocking.

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<sup>121</sup> Emphasis in original.

The Court left open the possibility that such “conscience-shocking” methods on the part of the police may result in §1983 liability.<sup>122</sup>

However, the Court was “satisfied that Chavez’s questioning did not violate Martinez’s due process rights. In Lewis, the court held that official behavior that will be held to be conscience-shocking is “the conduct intended to injury in some way unjustifiable by any government interest.” The Court noted that Chavez did not interfere with Martinez’s medical treatment and that he ceased his interview to allow medical procedures and tests to be performed. The Court stated that “the need to investigate whether there had been police misconduct constituted a justifiable government interest given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.” As such, the Court found that no Fourteenth Amendment violation occurred.

The Ninth Circuit’s decision was overturned and the case remanded for further proceedings.

**Bunkley v. Florida**  
**123 S.Ct 2020 (2003)**

**FACTS:** On April 16, 1986, Bunkley burglarized a closed and unoccupied restaurant. He was arrested as he left the building, and the officers found a folded pocketknife<sup>123</sup> in his

pocket. He was charged with burglary in the first degree because he was armed with a “dangerous weapon.” He was convicted and his conviction was upheld upon appeal in 1989.

Similar to Kentucky law, Florida includes under the definition of “weapon” a number of items, but excludes a “common pocketknife.” In 1951, the Attorney General of Florida had opined that a pocketknife with a blade of less than four inches would qualify as a “common pocketknife.” In 1997, in the case of L.B. v. State, the Florida Supreme Court finally interpreted the meaning of “common pocketknife” and overturned the conviction of a man who had in his possession a folding knife with a blade length of 3 ¾ inches.

Bunkley asked for postconviction relief, stating that his conviction for armed burglary was invalid and should be vacated. The Florida courts denied the relief, stating that the 1997 decision<sup>124</sup> could be not applied retroactively to Bunkley’s conviction.

**ISSUE:** Is an individual convicted under an earlier judicial interpretation subject to postconviction relief, when a later interpretation differs?

**HOLDING:** Possibly

**DISCUSSION:** The Court held that Fiore v. White<sup>125</sup> was controlling in this issue. Fiore involved a Pennsylvania criminal statute that

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<sup>122</sup> City of Sacramento v. Lewis, 523 U.S. 833 (1998).

<sup>123</sup> The knife was described to have a blade of 2 ½ to 3 inches in length.

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<sup>124</sup> 700 So. 2d 370 (Florida, 1997).

<sup>125</sup> 531 U.S. 225 (2001)

was “interpreted for the first time” only after the defendant, Fiore, was convicted, and whether that justified a retroactive reconsideration of the conviction. The Court found that if the Florida Supreme Court’s decision in L.B. was “a correct statement of the law when [Bunkley’s] conviction became final,” then Bunkley was entitled to a determination about the knife. Because the Florida court did not holding that L.B. was a change in the law, rather than a clarification of the law, the Florida Court was required to consider if the pocketknife held by Bunkley was a weapon in 1989.

The case was remanded for further consideration by the Florida courts.

**Virginia v. Hicks**  
**123 S.Ct. 2191 (2003)**

**FACTS:** Whitcomb Court is a housing development owned and operated by the Richmond Redevelopment and Housing Authority (RRHA). Streets within the complex were public until 1997, when they were privatized to assist the effort to “combat rampant crime and drug dealing” in the complex; nonresidents committed much of the crime. When the streets were conveyed to the RRHA, they were required to give notice that the streets in the complex were not public streets. The RRHA prominently posted signage to that effect, and authorized the Richmond police to serve notice upon anyone who could not demonstrate a legitimate reason to be present in the complex, and to arrest any person for trespassing when appropriate.

Defendant Hicks was not a resident of the complex and had been convicted twice before of trespassing and once of damaging property in the complex. While the charges were pending, he was given written notice that he was barred from the property. He later asked for permission to return, and was denied. In January, 1999, he was found in the complex and arrested, and eventually convicted.

At his trial, Hicks maintained the policy was overbroad and void for vagueness. The Virginia Court of Appeals held that the streets in the complex were a “traditional public forum” and vacated his conviction on the basis of the First Amendment. The Virginia Supreme Court affirmed on different reasons, holding the policy was overbroad because it gave the complex manager “too much discretion” to decide who was “authorized” to be in the complex.

The Commonwealth of Virginia requested certiorari.

**ISSUE:** Is a policy prohibiting the presence of an individual previously barred from private property constitutional?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Hicks himself did not claim that he was engaging in “constitutionally protected conduct when arrested,” or that the trespass statute was invalid, but that the RRHA policy was overbroad.

The Court discussed the concept of finding a statute overbroad, and found that Hicks had not made such a showing. Hicks had argued that since the “unwritten rule” with regards to the claim that the manager was given discretion to decide about “leafleters and demonstrators” being allowed on the property, the entire policy was overbroad and violative of the First Amendment.

However, the Court found that not to be the case. The rule applied to all individuals who had been barred for any reason, and regardless of why they seek reentry to the area.

The Court found the Hicks was punished for his “nonexpressive conduct – his entry in violation of the notice-barment rule – not his speech....”

The Court reversed the judgment of the Virginia Supreme Court and remanded the case.

**Lawrence v. Texas**  
**123 S.Ct. 2472 (2003)**

**FACTS:** Harris County (Houston) officers were dispatched to a private residence in response to a “reported weapons disturbance.” There, they entered the apartment<sup>126</sup> of John Lawrence and found he and another man, Tyron Garner, engaging in a sexual act. They were arrested, charged and convicted of a violation of Texas law prohibiting consensual homosexual conduct.

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<sup>126</sup> The entry of the officers into the apartment was not challenged.

Under Texas law, they were entitled to a right to a trial in the Harris County Criminal Court, where they challenged the constitutionality of the law. The appellate court affirmed their convictions, holding the case of Bowers v. Hardwick<sup>127</sup> to be controlling.

Lawrence and Garner requested certiorari.

**ISSUE:** Is it a violation of the Fourteenth Amendment to criminalize conduct between same-sex couples for conduct that is legal between different-sex couples, in effect, should Bowers v. Hardwick be overruled?

**HOLDING:** Yes

**DISCUSSION:** The Court engaged in a historical review of earlier cases relating to private sexual conduct. The Court agreed that the facts in Bowers were similar to the instant case. However, the Georgia statute in Bowers prohibited the conduct no matter whether the parties were of the same or different genders, while the Texas statute was specifically directed towards homosexual conduct.<sup>128</sup>

The Court discussed the concept of sodomy, and found that there was no distinction in early America between homosexuals and heterosexuals, the law instead focused on nonprocreative sexual conduct, which included heterosexual

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<sup>127</sup> 478 U.S. 186 (1986).

<sup>128</sup> Hardwick, the plaintiff in Bowers v. Hardwick, was not prosecuted, but brought an action to declare the state statute invalid.

sodomy. The Court found there was little evidence that sodomy prohibitions were applied to consenting adults acting in private. Where there were prosecutions, it appears that the cases involved conduct that occurred in a public place. It was only in the 1970s that states began to single out “same-sex relations for criminal prosecution” and noted that only nine states had enacted statutes to that effect.<sup>129</sup> In some of those states, including Kentucky, the courts have overturned those statutes by case law.<sup>130</sup>

The Court did not trivialize those that hold the belief that such conduct in unethical and immoral. Instead, the Court stated that the “issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.” The Court noted that while prior to 1961, all 50 states had outlawed sodomy (regardless of the parties involved), that the “prohibitions often were being ignored, and quoted Bowers, stating that “[t]he history of nonenforcement suggests the moribund character today of laws criminalizing this type of private, consensual conduct.”

The Court addressed the point that while the Bowers Court focused on

the history that prohibited homosexual conduct, while ignoring a wealth of evidence, including international law, that “point[ed] in an opposite direction.” Post-Bowers cases confirmed the Court’s belief in “constitutional protections” for “personal decisions.” The Court found that the “continuance [of Bowers] as precedent demeans the lives of homosexual persons.” The Court stated unequivocally:

“Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.”

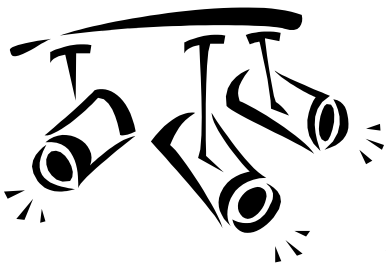
The Court went on to state that the case involved consenting adults involved in private conduct, engaged in “sexual practices common to a homosexual lifestyle.” The Texas statute “further[s] no legitimate state interest which can justify its intrusion into the person and private life of the individual.”

The court overturned the convictions and remanded the case.

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<sup>129</sup> Kentucky was one of those nine states, with 1974 Ky. Acts p. 847, codified as KRS 510.100, Sodomy in the Fourth Degree.

<sup>130</sup> Kentucky overturned the provision in Comm. v. Wasson, 842 S.W.2d 487 (Ky., 1992). As such, while Sodomy in the Fourth Degree remains a statute “on the books,” it is unenforceable.



## Spotlight Topic

### Use of Force during Terry Stops



The case of Terry v. Ohio, 392 U.S. 1 (1968) became law when it was decided in 1968. Since that time, the jargon of “a Terry” has become a short way to say “a temporary investigative detention based upon reasonable suspicion.” Under appropriate circumstances, Terry also allows an officer to frisk or pat down a suspect if the officer can articulate a reasonable suspicion that the individual is carrying a weapon. From that initial case, however, the courts have seen a proliferation in the progeny, the “children” of Terry v. Ohio.

A regular question under Terry, however, is the degree of force that may be used to effectuate and continue a Terry stop and frisk and in particular, whether handcuffs may be used. The original Terry case did not indicate that any force whatsoever was used, however, in many cases, the individuals who are stopped are not as cooperative as the Terry suspects (Terry, Chilton and an unidentified male who was not arrested). A stop which involves physical force risks being classified as a de facto arrest, and if the officers are found to lack probable cause for that arrest, they risk a claim of an unlawful arrest.

Cases in recent years have helped to “flesh out” exactly how much force is permitted in making a Terry stop, what degree of force/confinement may escalate the stop to a de facto arrest, and how the suspect’s actions may lead to an escalation in the degree of force permitted to the officers.

In Florida v. Royer, 460 U.S. 491 (1983), the Court held that there is no “litmus-paper test for determining when a seizure exceeds the bounds of an investigative stop” and becomes an arrest instead.

In U.S. v. Whitlock, 556 F.2d 583 (6<sup>th</sup> Cir. 1977), DEA agents were working a drug case involving packages sent from Colombia. The agents had a search warrant for Whitlock's apartment, but as they arrived, Whitlock emerged and went to his car. Baudoin approached Whitlock with gun drawn and got him out of the car, and then placed Whitlock in handcuffs because he "was being belligerent and Agent Baudoin was concerned for the safety of his fellow agents." He took Whitlock to his apartment, and read the search warrant to him. Baudoin stated that Whitlock was still not under arrest at this time, nor did he advise him of his rights. However, he did admit that he blocked in Whitlock's car, and that he would not have allowed him to leave. After the agents found what they were looking for, they placed him under arrest. (At one point they searched Whitlock's wife's car, although they did not have a warrant for the vehicle, as well. Whitlock and his wife stated they did not know they could object to the search.) The Court found that these actions were "clearly not limited to an initial stop for the purposes of making an on-the-scene investigation...." The Court held that Whitlock was "under arrest" from the beginning of the detention.

In U.S. v. Hemphill, 767 F.2d 922 (6<sup>th</sup> Cir., 1985), two men were stopped under a strong suspicion that they had stolen farm chemicals. "In light of the information that the ... Langford and Adair (co-defendants) were to be considered armed and dangerous,<sup>131</sup> ... the law enforcement officers used extraordinary caution to protect themselves and others." They "were ordered out of the van, placed face down on the ground so as to inhibit their ability to obtain or use a weapon, and were handcuffed." Shortly afterward, a search warrant was obtained and quantities of herbicide were found in the vehicles. The co-defendants argued that the manner of the stop "in effect, constituted an arrest" that was not supported by probable cause, and negating the search of the van. The Court quoted Terry stating that the test "for a particular intrusion into one's personal security" depends upon whether the officer's action was justified at the inception, and "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Finally, the Court stated that "[w]hile this Court, in no way wants to suggest to law enforcement officials that the highly intrusive gundrawn approach is the proper manner in which to conduct a routine investigatory stop ...," the Court agreed it was appropriate under the circumstances of this case.

In U.S. v. Hardnett, 804 F.2d 353 (6<sup>th</sup> Cir. 1986), Anthony Hardnett was initially stopped by Officers Ball and Shaw. Wideman and Romolino arrived as well. The officers were responding to a "men with guns" call. The officers had been given a location and a vehicle description. When Shaw approached the vehicle, occupied by four males, the driver (Hardnett) opened the car door, and Shaw saw a rifle on the floor. Ball also saw the rifle. Ball "took the driver, patted him down [and] found a nickel-plated revolver in his waistband." Wideman and Romolino ordered everyone out of the car, at gunpoint. Wideman saw a rifle laying on the floor in the back seat. Hardnett claimed that the stop, in which

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<sup>131</sup> One had been charged in the past with killing a police officer.

officers blocked in his car and approached he and his passengers with guns drawn, was a de facto arrest that lacked probable cause. The officers, however, claimed that the stop was a Terry stop, and that their actions were appropriate given what they knew at the time.

The Court stated that “[t]here is no doubt that a seizure occurred within the meaning of the Fourth Amendment occurred; we simply must determine whether the seizure rose to the level of an arrest.” The Court looked at the “degree of intrusion into the suspect’s personal security was reasonably related in scope to the situation at hand, which is judged by examining the reasonableness of the officials’ conduct given their suspicions and the surrounding circumstances.” While the Court agreed that the officers’ show of force in approaching the car “was highly intrusive and under some circumstances would certainly be tantamount to an arrest.” However, the Court stated that “the mere use of display of force in making a stop will not necessarily convert a stop into an arrest.” When the “display or use of arms is viewed as ‘reasonably necessary for the protection of the officers,’ the courts have generally upheld investigative stops made at gunpoint.” The Court went on to say that “if the surrounding circumstances give rise to a justifiable fear for personal safety, a seizure effectuated with weapons drawn may properly be considered an investigative stop. Under the circumstances of this particular case, the Court found that the use of weapons in making the stop was appropriate and reasonable. Neither did they believe that the boxing in of Hardnett’s car cross the boundary of reasonableness.

In U.S. v. Lane, 909 F.2d 895 (6<sup>th</sup> Cir. 1990), officers encountered Lane, apparently fleeing from other officers who were canvassing a building for drug trafficking suspects. Officer Barry met Lane on the third floor; Barry had his gun drawn and held downward. When he saw Lane, he ordered him to put his hands on the wall. Lane reluctantly complied, but then removed his hand and reached inside his coat. Barry told him to keep his hands up, but Lane “again attempted to reach into his pocket.” Barry patted down Lane, and discovered a sawed-off shotgun, and arrested him on a weapons charge. The Court agreed with the prosecution, however, that “[f]light invites pursuit and colors conduct which hitherto has appeared innocent,” and agreed that Barry’s actions were reasonable.

In U.S. v. Garza, 10 F.3d 1241 (6<sup>th</sup> Cir 1993), DEA agents stopped two trucks being driven by four men, on suspicion of drug trafficking. Because the agents were concerned about weapons, and about the “dark and snowy conditions,” two of the agents approached the semi cab from behind. They challenged the truck, and Reymundo emerged, was frisked and was handcuffed. They challenged the truck a second time, and Cruz emerged. Cruz stated there was no one else in the truck, but one of the agents decided to check. When he looked into the cab, he smelled marijuana, and Reymundo eventually consented to a further search. The men were arrested. However, given the situation as the officers understood

it to be, the court quoted Hardnett in finding that they had a reasonable fear for their safety.

In U.S. v. Dotson, 49 F. 3d 227 (Ohio, 6<sup>th</sup> Cir., 1995), officers stopped Dotson because they suspected that he may be involved in drug trafficking. They actually stopped Dotson because he committed a traffic violation in their presence, but they were actually surveilling him at the time.<sup>132</sup> Dotson was instructed to stay in the car, but instead, he got out. Officer Gannon, who made the stop, believed that Dotson was about to flee, so he placed his hand on Dotson's shoulder. Dotson began to run, and other officers jumped on both of them. At that point, he was formally arrested. The Court found that Officer Gannon's action to restrain Dotson was "an appropriate degree of force to effectuate the Terry stop, and that Dotson's attempt to flee ripened Det. Gannon's reasonable suspicion into probable cause to arrest Dotson."

In Houston v. Clark County Sheriff Deputy John Does 1-5, 174 F.3d 809 (6<sup>th</sup> Cir. 1999), deputies were responding to fighting in a bar parking lot. Two deputies, Hopper and Schutte, were initially dispatched. When they arrived, they found multiple fights, and when they intervened, they were attacked with rocks and bottles. They heard sounds they believed to be gunfire, heard someone exclaim "he's been shot, " and saw someone (later discovered to be the security guard), lying on the ground and bleeding profusely from a wound to the head. Dep. Schutte saw someone get into a car and speed off. He suspected that individual was responsible for the shooting. He could not find Dep. Hopper in the melee, and believed that his partner may have been shot. He radioed in this information and requested help.

During this time, Dep. Hopper heard the radio message from Schutte about the car fleeing the scene, and that someone was shot, and he got into the car and headed in that direction. Dep. Schutte's description of the car was "sketchy at best," due to the confusing nature of the scene, the only distinguishing feature he could report was the shape of the taillights. (By this time, Schutte apparently realized that his partner was alright and in pursuit.)

Schutte informed Hopper of "the number of cars between Deputy Hopper's vehicle and the suspect's." However, Hopper misunderstood Schutte's method of counting and this resulted in Hopper stopping the vehicle occupied by Houston and Perkins, the plaintiffs, who had also just left the tavern. Hopper drew his weapon and instructed them to throw out the keys, and get out of the vehicle.

Troopers Dickens and Click arrived to assist Hopper. They had heard the transmission about an officer being shot at the bar, and that "suspects" were stopped nearby. Believing that this was in fact the situation, and seeing Hopper

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<sup>132</sup> This case predates Whren v. U.S., 517 U.S. 806 (1996) where the concept of a pretext stop was created.

with his gun drawn on the individuals. Trooper Dickens had his handgun pointed at Perkins, and Click had his shotgun pointed at Perkins, as well. Finally, Houston threw out the keys, both men got out of the car and lay on the ground, as ordered. They were handcuffed and placed into police cruiser. Dickens then left to go to the tavern. Hopper explained the situation to the two “suspects” and asked for permission to search the car, which he received from Houston. Nothing was found in the car.

Back at the tavern, Deputy Schutte and others searched the area of the bar, looking for casings and weapons. Finding neither, but found a broken bottle near where the guard had been lying. The inferred that there had not been a shooting, but that the guard had been struck with a bottle. When Hopper radioed for a description of the suspect, Schutte “told him that he could not describe the suspect and that a shooting likely never occurred.” Hopper was still suspicious, however, that the men had been involved in the fight, and continued to question them. Finally, they were released. Dispatch logs show 33 minutes elapsed between the time of the “shots fired” call and the time the officers cleared the scene with Perkins and Houston.

Houston and Perkins sued, claiming that the stop lacked even reasonable suspicion and that the length of the detention and the display of weapons, and the handcuffing, transformed the stop in to an arrest not supported by probable cause. The trial court rejected their arguments and they appealed. The appellate court found that the reasonable (but mistaken) beliefs of the officers justified the initial stop. Quoting Pray v. City of Sandusky, 49 F.3d 1154 (6<sup>th</sup> Cir. 1995), the Court stated that officers are “regularly forced to make critical decisions under extreme pressure.” Deputy Hopper and the troopers took action on the reasonable premise that there had been a shooting.

With regard to the handcuffs, the Court quoted a number of cases, including some of those listed above, in support of the idea that drawing weapons and using handcuffs, and confining detainees briefly in cruisers, does not automatically ripen the stop into an arrest. They found the officers’ precautions to be “reasonably related” to the purpose of the stop.

As to the length of the detention, the Court stated that there is ‘no rigid time limit’ for a Terry stop. The length of time at this stop was neither “surprising or disturbing” to the Court.

The Court of Appeals upheld the judgment in favor of the officers.

The most recent case concerning this issue is U.S. v. Ware, 154 F.Supp.2d 1016 (6<sup>th</sup> Cir., 2001). This case was reversed on other grounds, but the court’s relating to the handcuffing was not changed. The Court held that removing Ware from a vehicle, frisking and handcuffing him, prior to actually arresting him, was appropriate under the circumstances.

In conclusion, officers are permitted to use a reasonable amount of force to effectuate a Terry stop. That force might include using drawn weapons, physical contact, handcuffs and confinement. The critical point to remember is that officers must be able to articulate the facts, and the reasonable inferences they drew from those facts, for each of their actions.

## Matricula Consular

Kentucky law enforcement officials are now being faced with new and complex issues relating to the validity of certain documents presented by foreign nationals (aliens). These documents range from visas/passports, operator's licenses from foreign countries, International Driver's Permits to Taxpayer Identification Number cards, among others. This memorandum concerns the "matricula consular" card that is being increasingly issued by Mexican consulates in the United States.

### ISSUANCE OF A MATRICULA CONSULAR

One document that an officer might receive as identification from a Mexican national is called a Certificado de Matricula Consular, often just referred to as a matricula consular<sup>133</sup> card. This card is being issued by Mexican consulates across the United States on the strength of the Mexican foreign national presenting three documents: a Mexican birth certificate, a photo ID (such as a Mexican operator's license or military identification card) and documentation (such as a letter from a landlord) that the Mexican national is residing in the United States at a particular address. The document also requires two passport-sized photographs. However, there have been news reports that failure to present all three of these documents is not fatal, and that aliens have been allowed to get a matricula consular without having the required documents.

The original purpose of the matricula consular card was to provide photo identification to a Mexican national who had left Mexico without valid documents, such as a passport and visa, the documents that the individual would need to get back *into* Mexico. In other words, for illegal aliens to return home. While these cards have been issued for many years, their use was previously very limited, and law enforcement officers would be highly unlikely to see even one in their whole career. However, in recent years, Mexican consulates have been issuing large numbers of these cards; reports indicate that more than one million are currently in circulation in the United States.<sup>134</sup>

Newly-issued matricula consular cards have become more difficult to counterfeit; they include an address and the location of the issuing consular office and they have holographic design. There are older cards in circulation, however, that are still valid for use. The "breeder" documents, the birth certificate, the photo ID from Mexico and the document to prove a home address, are not necessarily scrutinized by individuals who are trained to spot counterfeits, and the standards

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<sup>133</sup> This document is referred to by several variations on the name, the memo uses the form preferred by the U.S. Congress.

<sup>134</sup> Wall Street Journal, Mexico Expects to Issue More Than 1M Consular IDs in US, <http://www.freerepublic.com/focus/news/709906/posts>

for issuing the cards appear to differ from consulate to consulate.<sup>135</sup> Given how quickly the cards are issued upon request, within hours if not minutes, there is apparently no attempt made by the Mexican consulate to verify the validity of these documents, or if it is even possible for the consulates to access the information needed to verify the documents provided. (State governments in Mexico do not apparently have the ability to verify such information by computer in a timely fashion.) Matriculas may be issued from “mobile” consular officer, set up in locations in the community, and since all are issued the same day they are requested, in-depth scrutiny of the breeder documents appears impossible.

## **ACCEPTANCE OF THE MATRICULA CONSULAR**

There has been a concerted effort by the Mexican consulates in certain states (Texas, California and Colorado, among others) to strongly encourage government and governmentally-regulated private entities, such as banks, to accept the matricula consular as a valid form of identification for their services. Access to banking services is a particularly important issue for most Mexican nationals, who otherwise are forced to send money through brokers, or by purchasing money orders and the like, both of which add to the cost of sending money to family members in Mexico. The U.S. Treasury is required by Section 326 of the Uniting and Strengthening American by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, to develop regulations requiring “financial institutions to implement reasonable procedures to verify the identify of any person seeking to open an account, to the extent reasonable and practicable....”<sup>136</sup> Currently, the final rule issued under this statute gives banks a tremendous amount of flexibility in choosing which documents they may accept, including foreign government-issued documents such as the matricula. At this time, these regulations are under a congressional resolution of disapproval, essentially a congressional veto.<sup>137</sup> In addition to those actions already mentioned, there are three other pieces of federal legislation currently pending that concern, directly or indirectly, the issue of matricula consular cards.<sup>138</sup>

Legal foreign national visitors to the United States are permitted to open bank accounts, using their passports and visa documents. (Note that visas are issued by the United States, for visitors to the U.S., while passports originate with the

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<sup>135</sup> The author has found no reliable statistics to show how many individuals are denied matricula consular cards by the various consulates.

<sup>136</sup> Vol. 68, No. 90, May 9, 2003, Federal Register 25090-25113 (Final Rule).

<sup>137</sup> H.J.Res. 58 (<http://thomas.loc.gov/cgi-bin/query-D?c108:S:/temp/~c108mYrN6g::>)

<sup>138</sup> H.R. 502, introduced January 29, 2003, restricts federal benefits to individuals who present federal or state government-issued identification, identification that is subject to verification by law enforcement. H.R. 687, introduced February 11, 2003, prohibits the Federal Government from accepting any form of identification issued by a foreign government, except for a passport. This Act may be cited as the “Identification Integrity Act of 2003.”

H.R. 773, introduced February 13, 2003, specifically authorizes the Treasury to formally accept the matricula consular as valid identification.

holder's home country.) If they do not have work privileges, but have need of a bank account, for example, if they are students, and thus are not eligible for a Social Security number, they may obtain an Individual Taxpayer Identification Number (referred to as an ITIN or just TIN) from the IRS.<sup>139</sup> Some form of a TIN is needed for banking in the United States.

Recently, Steven McCraw, of the FBI, spoke before a congressional immigration panel concerning the acceptance of the matricula consular. McCraw expressed concern about the lack of sufficient security measures in obtaining the card, and cited instances of alien smugglers holding multiple cards when arrested, and an Iranian national with a matricula consular in his own name. The FBI noted that Mexican birth certificates are a "hot item in the fraudulent-document trade."<sup>140</sup> During this same hearing, it was noted that the federal government had stopped accepting the matricula consular as identification to enter federal buildings early in 2003. Witnesses in opposition to the FBI's view noted that it allows the holders to have bank accounts, thus reducing their need to carry large amounts of cash, which subjects them to a greater risk of theft, and because it gives law enforcement a form of identification.

The U.S. Border Patrol in California has also expressed concern about the ready acceptance of matricula consular cards, citing the same cases as mentioned by the FBI.<sup>141</sup>

In addition, congressional leaders have lobbied Secretary Tom Ridge, Homeland Security, to "act decisively" in dealing with the issue of consular identification cards. They expressed concern that the matricula consular "can be a perfect breeder document for establishing a false identity...." They stated that there is an executive branch interagency task force meeting to generate a "unified federal policy" concerning federal acceptance of the cards, acknowledging that the federal policy will have an "implicit effect on how most States view these cards." In the letter to Secretary Ridge, the members noted that the government and consulates of Mexico have no centralized and/or interconnected databases to verify that multiple cards are not issued to the same individual, that cards are issued based upon documents that are easy to obtain fraudulently or to falsify, and that in some cases, a Mexican national without the required breeder

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<sup>139</sup> An ITIN number is issued by the IRS, and resembles a Social Security numbers; the digits appear as 9XX-XX-XXXX. Unlike the matricula consular, there are legal international visitors to the United States who are issued ITINs for a variety of purposes. However, these numbers may also be obtained by aliens who are illegally working, but whose employers fear prosecution by the IRS for failure to report income paid, and who require their employees to obtain ITINs to allow those employers to report their income to the IRS. More information about ITINs is available at the following link:

<http://www.irs.gov/individuals/article/0,,id=96287,00.html>

<sup>140</sup> Stephen Dinan, Mexican ID not valid, a 'threat,' FBI says. at <http://washingtontimes.com/national/20030627-120946-7472r.htm>.

<sup>141</sup> U.S. Border Patrol: Matricula Card Worthless as ID, Could Benefit Terrorists, Criminals at <http://www.fairus.org/html/07439403.htm>.

documents may obtain a card by simply completing a questionnaire that satisfies the official that they are who they claim to be. The congressmen, one of whom is Rep. Harold “Hal” Rogers of Kentucky, repeated the assertion, mentioned in other articles as well, that no major bank in Mexico accepts the matricula consular to open an account, and that only a minority of the Mexican state governments consider it to be valid for identification purposes. Finally, the letter writers stated that only the Mexican government, through its consulates, has any records to authenticate (or invalidate) the cards and law enforcement is “wholly reliant upon the Mexican government” to provide information. They concluded with the statement that “federal government acceptance of unreliable identification cards from person resident in the United States compromises our homeland security.”<sup>142</sup>

## **DRIVING PRIVILEGES IN KENTUCKY**

In Kentucky, a legal foreign national who is temporarily resident in Kentucky may apply for a Kentucky operator’s license or a non-driver identification card upon presentation of the appropriate visa and passport to designated offices of the Kentucky Transportation Cabinet. These documents are valid for the duration of time listed on the visa.<sup>143</sup> At this time, by a statute that limits the documents that are acceptable to those that are listed in the statute, the Kentucky Transportation Cabinet, Driver’s Licensing Bureau does not accept the matricula consular as a valid form of identification for any purpose related to driver’s licensing or for issuing a non-driver’s identification card.

In addition, foreign nationals who are temporarily in Kentucky may drive on their home country operator’s license.<sup>144</sup> The law is essentially silent as to whether this privilege extends to illegal aliens present in Kentucky. Foreign drivers may also present a valid International Driver’s Permit, along with their home country license, but an IDP is not required in Kentucky. Foreign drivers are fully subject to the traffic and other laws of Kentucky.<sup>145</sup> On a practical note, of course, most of the time officers will have no idea of the length of time any person has actually been in Kentucky, but since issuance of a matricula presumes a period of time in residence in the consular district, possession of a matricula may be a rebuttable presumption, at least, that the holder considers themselves to be a resident of Kentucky.

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<sup>142</sup>Committee Leaders Urge Curbs On Acceptance of Consular ID Cards at <http://www.house.gov/judiciary/news0710.htm>.

<sup>143</sup> KRS 186.412

<sup>144</sup> KRS 186.430

<sup>145</sup> However, consular and diplomatic officers, carrying U.S. State Department-issued identification that will indicate the level of immunity of the holder, are immune from arrest. Not all diplomatic/consular personnel carry the same level of immunity, however, and officers should check with the U.S.State Department concerning the status of the individual detained.

## **USE AS IDENTIFICATION IN KENTUCKY**

No private business (such as grocery stores, banks, etc.) is required to accept the matricula consular card as valid identification; in fact, each company makes an individual decision as to the documents it will accept for identification for check cashing purposes, for example. It is unknown, however, how many do, in fact, accept it for any business purpose. As discussed above, identification for banking purposes is not within the purview of local governments, but is within the authority of the U.S. Treasury. A general acceptance by a local government of the matricula consular card does create a de facto validation of the card by the local government, however, and may encourage other business to accept the card as identification, as well.

## **CONCLUSION**

Currently, only Mexico issues matricula consular cards, but other Central and South American countries, such as Guatemala, have indicated that they may do so in the future. Presumably, other countries, including Middle Eastern countries, may attempt to do so as well. It will prove difficult for the United States, under the traditions of international relations and consular practice, to accept consulate-issued identification cards from some countries and to refuse to accept the card from others, for the same purpose. While some U.S. State Department employees have raised the issue of reciprocity as a concern for agencies in refusing to accept the card, the United States does not routinely offer a similar document to U.S. citizens in other countries, although presumably the local consulates will assist a U.S. citizen illegally in another country to return home.

The decision as to whether local governments in Kentucky choose to accept these documents as proof of identity is best left to the local governments. Certainly, they may prove useful to officers as a starting place in determining the identity and home address of a foreign national. However, it is critical that local governments make this decision with a full understanding of the limitations of the matricula consular card, particularly the ongoing concerns about their reliability, and the ramifications inherent in accepting the cards because of the ease of obtaining the cards and the inability of local governments to verify the information on the card, as well as the potential federal legislation concerning the acceptability of the cards.

There are other documents originating in the Mexican government that are generally considered to be more reliable, such as Mexican operator's licenses and voter identification cards, and officers are advised to look beyond the proffered ID card for other identification documents, when necessary. (For example, legal foreign nationals may be unaware that they are permitted to drive on their home operator's license in Kentucky, pursuant to KRS 186.430, and it may not occur to them to present that document.) Because the matricula consular cards are such a new occurrence in Kentucky, there are no statistics as

yet as to how commonly officers encounter them, and how valid the information on the cards has proven to be. Agencies are urged to keep an ongoing record of these types of details<sup>146</sup> and to contact the Kentucky Department of Criminal Justice Training, Legal Section with any concerns or comments.

#### **ADDITIONAL READING:**

Cativo, Fulvio Mexican consul backs ID card, The Courier-Journal, available at <http://www.courier-journal.com/localnews/2003/07/19ky/met-front-consul07190-5170.html>.

Colorado Alliance for Immigration Reform, The Mexican matricula consular (illegal alien) card, at <http://www.cairco.org/matricula/matricula.html>.

Committee Leaders Urge Curbs On Acceptance of Consular ID Cards at <http://www.house.gov/judiciary/news0710.htm>.

Dinan, Stephen. Mexican ID not valid, a 'threat,' FBI says, Washington Times, June 24, 2003 at <http://washingtontimes.com/national/20030627-120946-7472r.htm>.

Dinerstein, Marti. Ids for Illegals: The 'Matricular Consular' Advances Mexico's Immigration Agenda, Center for Immigration Studies, available at <http://www.cis.org/articles/2003/back303.html>.

Federal for American Immigration Reform, Issue Brief: The Mexican Matricula Consular Should Not Be Accepted for Official Purposes at <http://www.fairus.org/html/04193072.htm>.

ID cards open doors: Matricula consular helps new residents prove identity, obtain services at <http://www.freerepublic.com/focus/news/731962/posts>.

King, Micah. Legal Objections to Acceptance by U.S. Institutions of the Matricula Consular and other Foreign-Issued Consular Identification Cards, Friends of Immigration Law Enforcement at <http://fileus.com/dept/id/matricula/03-06-15-brief.htm>.

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<sup>146</sup> As an example, officers might note on the citation as to the source of the information listed on the citation, for all cited or arrested subjects. Then, if the individual does not appear in court, and an officer attempts service on an address that proves to be false, it will be useful to know if the false information was contained on a matricula consular card, an operator's license (from Kentucky, another U.S. state or a foreign country) or another form of identity card, or was given verbally. This type of documentation may lead to additional criminal charges of forgery, criminal possession of a forged instrument, failure to update address in motor vehicle records, or other charges. As of now, it is impossible to know if the majority of these cards (or other types of documents, for that matter) are reliable for the purpose of providing identity and addresses.

McGarry, Mike. Lo, the emperor's Mexican ID card – Boulder would be wrong to recognize it, reprinted on the website of the Colorado Alliance for Immigration Reform at <http://www.cairco.org/articles/art2002nov17.html>.

Riley, Michael, Mexican ID cards caught in growing debate, Denver Post, reprinted at <http://members.lycos.co.uk/lamigra/NEWS/MexCardsUnreliable021010.html>.

Role of State and Local Law Enforcement in Immigration: Panel Discussion Transcript, June 26, 2003, available at <http://www.cis.org/circle.html>.

Seper, Jerry, Mexico gives IDs to illegal aliens available at <http://dynamic.washtimes.com/twt-print.cfm?ArticleID=20030121-30744796>.

Seper, Jerry, GSA bars Mexican ID cards, The Washington Times, January 22, 2003, available at <http://www.washtimes.com/national/20030122-11837572.htm>.

U.S. Border Patrol: Matricula Card Worthless as ID, Could Benefit Terrorists, Criminals at <http://www.fairus.org/html/07439403.htm>.

Wall Street Journal, Mexico Expects to Issue More Than 1M Consular IDs in US, <http://www.freerepublic.com/focus/news/709906/posts>

Website of Congressman Tom Tancredo at <http://www.house.gov/tancredo/>

## HIPAA

The Health Insurance Portability and Accountability Act (HIPAA)<sup>147</sup> is a massive piece of legislation that will have a profound impact on many aspects of health care and health insurance in the United States. The intent behind this legislation is to protect electronically stored individually identifiable health information and electronic data interchange (EDI). With EDI becoming the common method of transferring data for health care and billing purposes, Congress feared that the easy interchange might lead to a risk to privacy and security of individual health care information.

Law enforcement officers can expect to encounter HIPAA restrictions in a variety of ways. For example, officers often expect to receive information as to a victim's medical condition from EMS crews at the scene, or from the hospital emergency room, and it is expected that those interactions will be strictly limited under the new regulations. If the patient is able to consent to the release of the information, the officers should have no problem, but if the patient refuses or is unable to consent, the officer will need to take further actions to get access to information that is needed immediately, when that information is held by a "Covered Entity."

"Covered Entities," or CE, are those entities which are subject to HIPAA regulation. CEs include health insurance plans, healthcare clearinghouses and healthcare providers who transmit health information electronically with specified transactions codes – in other words, virtually all hospitals, EMS services and other healthcare providers.<sup>148</sup> Health care information is defined very broadly and includes any information that relates to an individual's past, present or future medical information or care. The regulations specifically cover "protected health information" or PHI, which is any healthcare information that is "individually identifiable," that information that can be directly tied to a specific individual.

Individual CEs are expected to develop policies and procedures to limit the amount of information exchanged to that which is the minimum necessary to achieve the purpose. HIPAA requires that a patient's authorization be obtained for any disclosure of PHI that does not meet a specific exception, and it is expected the CE will develop forms for that purpose. (And unfortunately, this also means that every CE may have a different form for the purpose.)

There are exceptions to the requirement for this authorization, but they are very strict and very limited for law enforcement<sup>149</sup>. Disclosure that is required by state law continues to be allowed under HIPAA, if that disclosure is mandatory. If the state only permits disclosure, it may be argued that disclosure is not permitted under HIPAA.

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<sup>147</sup> Public Law 104-191 (Aug. 21, 1996)

<sup>148</sup> 45 C.F.R. §160.103

<sup>149</sup> 45 C.F.R. §164.501 et seq.

In Kentucky, the type of disclosures that are mandatory include the following:

- a) Psychiatric hospitals are required to notify law enforcement if an involuntarily committed patient escapes or is released, if that patient has been charged with or convicted of a violent crime. (KRS 202A.410)
- b) Medical and other professionals who suspect insurance fraud (KRS 304.47-050)
- c) Medical professionals (and in fact, anyone) who has knowledge concerning child (KRS 620.030) or adult abuse (KRS 209.030, 194A.709). (see below)
- d) Reporting of a suspicious death to the coroner (KRS 72.020)
- e) Public health issues (see below)
- f) HIV-AIDS (see below)
- g) Animal bites (see below)
- h) Pharmaceuticals (see below)

The issue of reporting real or suspected child abuse, at 620.030, is relatively simple and uncontroversial; it applies to medical professionals of all types. Adult abuse, however, is more complex. The duty to report abuse of an adult is codified at KRS 209.030, however, the definition of “adult” for this chapter does not include all adults. Specifically, KRS 209.020 defines an adult as “(a) [a] person, eighteen (18) years of age or older, who because of mental or physical dysfunctioning, is unable to manage his own resources or carry out the activity of daily living or protect himself from neglect, or a hazardous or abusive situation without assistance from others, and who may be in need of protective services; or (b) [a] person without regard to age who is the victim if abuse and neglect inflicted by a spouse.” In other words, someone who is so mentally or physically disabled as to be unable to exercise independent actions, or someone who is abused by a spouse. As spouse is not otherwise defined in Kentucky statutes, the law will revert back to the common-law usage, which is that a spouse is one’s legal husband or wife. Since Kentucky does not recognize common-law marriage, a medical professional would only be permitted under HIPAA to report abuse of someone who is in fact in a marriage recognized by Kentucky law, not other individuals who are in domestic or family relationships, if the victim is 18 or older and apparently competent. While law enforcement officers (through their agencies) are required to report the abuse of all incidents of domestic violence and abuse involving family members, members of unmarried couples and household members<sup>150</sup>, under KRS 403.785, of which they have knowledge,

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<sup>150</sup> Note that this statute does not define “household members.” In *Ireland v. Davis*, 957 S.W.2d 310 (Ky.App. 1997), the court held that the term unmarried couple “refers to two people engaged in an intimate relationship and would not include roommates.” Therefore, it is unclear whether a court would hold that roommates (whether same gender or opposite gender) would be covered under “household members” or not. A recent case, *Barnett v. Wiley*, 2003 WL 1936582 (Ky.), which is not yet a final opinion, indicates that the Kentucky Supreme Court is inclined to consider that the term “household members” to be “persons who are cohabiting in the same place.”

medical professionals will not be allowed to report any instances of abuse that do not fall under KRS 620.030, KRS 209.030 and KRS 194A.709. (The latter refers to residents in long-term or assisted care facilities, and who would also, in most cases, fall under KRS 209.030.)

With regards to general public health reporting standards, Kentucky law requires that reports be made of HIV-positive test results, to the state Cabinet for Public Health, although there is a provision for anonymity. Chapter 211 generally covers these issues, both for HIV and for other sexually-transmitted diseases. State Public Health is also authorized to take such action as the department deems necessary to monitor the spread of infectious and contagious diseases and to initiate quarantine and isolation as needed, and to report such diseases as designated by regulation to the appropriate authorities. (KRS 214.010, KRS 214.020, KRS 214.645 and 902 KAR 2.020). Medical laboratories may also be required by the Cabinet for Public Health to make certain reports. (KRS 333.130). This last statute may be problematical in that the federal statute suggests that only mandatory reporting will be allowed under HIPAA – and the Kentucky statutory language suggests, at least, that the order for reporting may be done on a case by case basis from Public Health, rather than by statute or regulation, because of the time needed to have even a new regulation passed. (An example is the potential SARS epidemic – since right now, SARS is not on the mandatory reporting list in Kentucky. However, SARS was added to the federal quarantinable communicable disease list as of April 4, 2003. This does not in and of itself require reporting, but presumably issues regarding SARS will be handled under the public health exception to the law.)

Physicians are required, under KRS 258.065, to report, within 12 hours of “first professional attendance” dog, cat and other animal bites to the local health department.<sup>151</sup>

Certain issues also arise with prisoners and individuals who are arrested and in custody, with regard to specified diseases. KRS 71.130 states that prisoners shall be tested for infectious diseases under appropriate circumstances, and test results may be shared with those who have a need to know the prisoner’s health status. (However, all other privacy protections remain in place for these prisoners.) KRS 510.320 states that defendants shall be tested for HIV upon conviction for crimes in which sexual contact is an element, and the results of such tests shall be shared with victims and others specified by the statute. There is no equivalent provision for other sexually-transmitted diseases, although a judge may order such testing on an individual basis if deemed appropriate. In addition, a criminal defendant or inmate who bites another inmate, a correctional officer or other public servant may be ordered by the court to undergo testing for a variety of contagious diseases, and the results of such testing shared with the victim (KRS 438.250).

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<sup>151</sup> In fact, every person bitten, even if no physician is involved, is required to report bites. Failure to report bites is a violation under KRS 258.990.

While Kentucky law does not require pharmacists and physicians who suspect drug abusers or “doctor shoppers” to report, they must allow law enforcement to inspect their records (KRS 218A.230). Records may be seized upon the presentation of the appropriate court order. (KRS 315.220 permits designated enforcement agents of the Board of Pharmacy to make such inspections and seizures, at their sole discretion, as well, but states that the records will otherwise remain confidential.) CEs that allow law enforcement to inspect records of any type are required to document this disclosure and to notify the patient concerning the disclosure. It is anticipated that CEs will develop their own procedures to document and notify when necessary.

CEs may also release information pursuant to court orders, search warrants, summons and subpoenas. Search warrants for such information must specifically list the documents required. Subpoenas duces tecum, signed by judicial officers, for the production of documents may also be used,<sup>152</sup> and finally, grand juries may request the production of medical records. Summons are not used in Kentucky for the production of records. Law enforcement agencies that investigate administrative violations may also use these court orders to request production of documents. In each case, the CE is expected to release only the documents specified by the order or the minimum amount needed to satisfy the purpose of the request. Officers are cautioned to give a great deal of thought as to what they need when requesting search warrants and court orders, to ensure that they are able to obtain the desired information.

HIPAA also permits the release of a limited amount of information in response to a law enforcement officer’s request for the purpose of identifying or locating a suspect, fugitive, witness or missing person. (The CE is not required to make this disclosure, but they may do so if they choose.) Certain limited information may be released, such as name, address, DOB, SSN, blood type, injury, treatment, death (if appropriate) and distinguishing physical characteristics. Information as to the analysis of body fluids or tissues (such as blood alcohol) may not be released under this provision, although the officer may request a separate sample of these fluids under KRS 189A.103, as in the case of DUI, for example. (In this situation, the medical provider will be extracting the sample, but not performing the analysis of the sample, so HIPAA provisions will presumably not apply to the testing agency, which likely would not qualify as a CE.) An example might be law enforcement officers making the rounds of hospitals searching for a missing person or material witness; the officer would be allowed to share information with the hospital concerning a name or description and if the hospital does in fact have a person in the hospital, the hospital would be permitted to share the information listed above with the officer.

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<sup>152</sup> The language of the regulation indicates that subpoenas duces tecum signed only by a requesting attorney, as is common in many civil cases, will not be honored, absent a court order or a specific consent from the patient for such documents.

The most problematic exception deals with a law enforcement officer's request for medical information concerning the victim of a crime or a wreck. If the individual agrees, of course, information may be shared with the officer, but if the victim is incapable of agreeing, the officer must 1) represent that such information is necessary to determine if a violation of law occurred by some person other than the victim, and that such information is not intended to be used against the victim, and 2) the officer represents that the law enforcement needs would be materially and adversely affected by waiting until the victim is in a position to agree, and 3) that the disclosure is in the best interests of the victim. CEs are being advised to get this information in writing from the officer, and to develop an internal process to evaluate if the disclosure is appropriate. This process may prove to be cumbersome and time-consuming for officers in emergency situations, and the process for each medical provider may prove to be different. Agencies are encouraged to discuss the matter in advance with local medical providers, especially with hospital emergency rooms and EMS responders, and learn in advance what requirements they will need to meet and what procedures will be in place to get a release of information. At best, officers may find themselves facing delays in getting information about victims until the medical providers can satisfy themselves as to the immediate need.

However, if an officer is present at an injury call, and overhears medical or other information while assisting EMS, that is considered an "incidental disclosure." An officer who is summoned into a residence because an EMS crew member, who is lawfully in the residence, has spotted something that may be evidence of a crime may be able to argue that the provisions of Hazelwood v. Com., 8 S.W.3d 886 (Ky.App., 1999) which permits the law enforcement officer to be summoned by another public safety officer who is lawfully at the scene and has inadvertently come across contraband to secure the contraband.<sup>153</sup>

There are also a few situations that apply to law enforcement in which a CE is not required to seek authorization before making a disclosure to law enforcement.<sup>154</sup> These include when the disclosure is necessary to "prevent or lessen a serious and imminent threat to the health or safety of a person or the public," to individuals who are threatened (including the law enforcement agency that may be able to mitigate the threat), or "because of a statement by an individual admitting participation in a violent crime that the covered entity reasonably believes may have caused serious physical harm to the victim." However, it should be noted that the CE is not required to disclose any information in this situation, but is only permitted to disclose by HIPAA, and that each CE will develop their own criteria and procedures to disclose such information. The law will require that the CE disclose to the patient that they have made such a disclosure, unless the CE believes that notifying the individual would place at further risk. (As an example, if the apparent perpetrator is

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<sup>153</sup> In Hazelwood, a firefighter responding to a fire scene found marijuana.

<sup>154</sup> 45 C.F.R. §164.512(j)

present, it would not be required, nor would it be advisable, for the medical provider to tell the patient that law enforcement has been notified.)

On a related note, Kentucky is one of a minority of states that does not require medical providers to report to law enforcement injuries connected to firearms or other deadly weapons, such as knives. Public Health does collect statistics on such injuries, but this information is “de-identified,” which means that it is not possible to connect a report to a particular individual; this type of data collection is permitted under HIPAA. The law is unclear if medical providers will be able to make such reports, although if they believe the injury fits another exception to the law, it will be permitted. Certainly, if an officer becomes aware of the injury, they may investigate it, and the officer may request information under the law enforcement exception, but if the law enforcement agency is not aware of the injury, hospitals and other medical providers may find themselves unwilling to risk making the report. Again, this is an issue that agencies should discuss in advance with local medical providers. One example that might illustrate this particular issue is a patient presenting at the hospital with a bullet wound. If the patient states that it was “an accident” and they do not want law enforcement to be notified, and the doctor believes, from the angle of the penetration, that it could not have been a self-inflicted accidental injury, the medical provider (doctor/hospital) must make a decision as to whether this disclosure is permitted.

While the implementation of HIPAA became effective as of April 14, 2003, it is anticipated that many more questions will arise in the upcoming weeks and months related to the interpretation of this law. Officers and agencies are encouraged to discuss the ramifications of HIPAA with local prosecutors and legal advisors, and to communicate their concerns and share problems that have arisen locally with their local legal advisors and with the Kentucky Department of Criminal Justice Training.